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ABSTRACT

This report from the United States Commission on Civil Rights focuses specifically on the efforts of the U.S. Equal Employment Opportunities Commission (EEOC) to enforce Title I of the Americans with Disabilities Act, which prohibits discrimination based on disability in employment. The report evaluates and analyzes EEOC's regulations and policies clarifying the language of the statute; processing of charges of discrimination based on disability; litigation activities under Title I of the Americans with Disabilities Act; and outreach, education, and technical assistance efforts related to the Act. The Commission finds that EEOC has developed a highly credible implementation and enforcement program for the Americans with Disabilities Act and that implementing the Act has been a major focus of the agency since the law was passed. EEOC has accomplished this while simultaneously taking a number of creative and innovative steps to attempt to deal with an overwhelming workload and insufficient resources. However, the Commission also found that EEOC is not fully responsive to the concerns and priories of its stakeholders. To ensure that all stakeholders have a voice in EEOC's policy development, the Commission recommends that the formal mechanism be instituted to obtain input from interested parties. (Contains over 800 references.) (CR)

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Helping Employers Comply with the ADA

An Assessment of How the United States Equal Employment Opportunity Commission Is Enforcing Title I of the Americans with Disabilities Act

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A Report of the United States Commission on Civil Rights
September 1998

EC 308286

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U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent. bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices;
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin;
- Submit reports, findings, and recommendations to the President and Congress;
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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Helping Employers Comply with the ADA

An Assessment of How the United States Equal Employment Opportunity Commission Is Enforcing Title I of the Americans with Disabilities Act

A Report of the United States
Commission on Civil Rights
September 1998

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *Helping Employers Comply with the ADA*, pursuant to Public Law 103–419. The report, along with a companion report, *Helping State and Local Governments Comply with the ADA* (on enforcement of title II, subtitle A, by the Department of Justice), reflects the Commission's commitment to ensuring that Americans with disabilities are afforded equal opportunity and that the Nation's civil rights laws prohibiting discrimination on the basis of disability are vigorously enforced. In accordance with this commitment, the Commission releases its first evaluation of the enforcement of the Americans with Disabilities Act, 8 years after enactment of the statute.

In this report, the Commission focused specifically on the efforts of the U.S. Equal Employment Opportunity Commission (EEOC) to enforce title I of the Americans with Disabilities Act, which prohibits discrimination based on disability in employment. The report evaluates and analyzes EEOC's regulations and policies clarifying the language of the statute, processing of charges of discrimination based on disability; litigation activities under title I of the Americans with Disabilities Act; and outreach, education, and technical assistance efforts relating to the act.

The report offers findings and recommendations on EEOC's implementation and enforcement of title I of the Americans with Disabilities Act. The Commission finds that, in general, EEOC has developed a highly credible implementation and enforcement program for the Americans with Disabilities Act and that implementing the act has been a major focus of the agency since the law was passed. EEOC has accomplished this while simultaneously taking a number of creative and innovative steps to attempt to deal with the reality it faces: an overwhelming workload with insufficient resources to carry out its mission. However, the Commission identified areas where EEOC's civil rights implementation and enforcement efforts for the Americans with Disabilities Act have fallen short and offers specific findings and recommendations to assist EEOC in enhancing its effectiveness in carrying out its mission to enforce title I of the act vigorously and efficiently.

In general, the Commission found that EEOC is not fully responsive to the needs and views of its stakeholders, including individuals with disabilities, employers, disability professionals, and disability experts. To ensure that all stakeholders have a voice in EEOC's policy development and decisionmaking related to the Americans with Disabilities Act, the Commission recommends that EEOC institute formal mechanisms to obtain input from interested parties, such as an Americans with Disabilities Act Advisory Board comprised of persons representative of the broad range of EEOC's stakeholders.

EEOC also has failed to be sufficiently aggressive in reaching small businesses and the minority community. The Commission calls upon EEOC to provide enhanced technical assistance, outreach, and education to ensure that employers, especially small businesses, understand their obligations under the law and that individuals with disabilities, particularly minorities, understand and are able to exercise their rights under the act.

Furthermore, although EEOC has made effective use of Commissioner-led task forces to evaluate and improve its operations in other areas, to date, EEOC has not taken steps to assess and improve its enforcement of the Americans with Disabilities Act. The Commission urges EEOC to create a task force to evaluate the effectiveness of its Americans with Disabilities charge processing and enforcement activities, particularly with respect to whether EEOC staff have sufficient training on the Americans with Disabilities Act and whether charges of discrimination based on disability are being accepted, investigated, and resolved appropriately.

The report contains numerous other findings and recommendations that the Commission believes will enhance EEOC's enforcement of the Americans with Disabilities Act. However, more important than the specific failings of EEOC's Americans with Disabilities Act implementation and enforcement program, the Commission found that EEOC's passivity in galvanizing public support for and understanding of the law has undermined the law's effectiveness. One of the Commission's principal findings is that EEOC has not been effective in counteracting negative portrayals of the act in the media and promoting understanding of and support for the Americans with Disabilities Act. The media often have portrayed the act negatively, exaggerating the potential for frivolous lawsuits under the law, rather than focusing on the law's promise to provide equal opportunity for individuals with disabilities. Similarly, judicial decisions misinterpreting the intent of the ADA threaten to weaken the law.

The ADA will never truly become an effective civil rights statute if it continues to be misunderstood and viewed negatively by the American public. Therefore, the Commission calls upon EEOC to work with the other Federal agencies charged with enforcing the ADA or protecting the interests of individuals with disabilities (such as the U.S. Department of Justice, the National Council on Disability, and the President's Committee on Employment of People with Disabilities) to promote greater understanding of and support for the ADA.

Finally, the Commission calls upon Congress to provide the resources needed for EEOC to carry out its responsibilities under the Americans with Disabilities Act and other civil rights laws prohibiting discrimination in employment. The Commission also urges the President and Congress to work together to reform the Nation's disability policy as a whole to ensure that it supports the goals of the Americans with Disabilities Act. In particular, Congress and the President should act on legislation currently pending in Congress, the "Ticket to Work and Self Sufficiency Act of 1998" and "The Work Incentive Improvement Act of 1998," designed to improve work opportunities for individuals with disabilities.

Equality of opportunity, full participation, independent living, and economic self-sufficiency are truly important goals that, if achieved, will enable all Americans with disabilities to realize the full measure of their potential and human dignity. A renewed national commitment to vigorous enforcement of the Americans with Disabilities Act is crucial to the achievement of these goals.

Respectfully,
For the Commissioners,

Mary Frances Berry

MARY FRANCES BERRY
Chairperson

Acknowledgments

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*Former Commission employee.

Contents

1. Introduction 1

2. Background 9
Statistical Profile of the Disability Community 9
  Numbers of People with Disabilities 9
  Socioeconomic Characteristics 10
    Age, Race/Ethnicity, and Gender 11
    Education 12
    Labor Force Status 12
    Income 13
    Participation in Government Programs 13
Individuals with Disabilities as a Minority Group 13
Federal Civil Rights Statutes from 1964 to 1988 15
Legislative History and Final Provisions of the ADA 17
  Overview of Legislative History 17
    Debates Over the ADA Bill 20
      Costs of ADA Compliance 21
      Concerns Over Increased Litigation 22
    Preemployment Inquiries 23
    HIV/AIDS 23
  Final Provisions and Enforcement of Title I of the ADA 24
  The Role of Other Federal Agencies and Programs 27
    President's Committee on Employment of People with Disabilities 27
    Protection and Advocacy Systems 28
    National Council on Disability 29
    National Institute on Disability and Rehabilitation Research 30
A Broader Context: America's Disability Policy 31

3. Organization and Administration of the U.S. Equal Employment Opportunity Commission 38
Mission and Responsibilities 38
Structure 41
  Office of General Counsel 42
  Office of Legal Counsel 43
  Office of Field Programs 45
    Field Offices 46
      District Offices 46
      Area Offices 47
      Local Offices 47
      Washington Field Office 47
      State and Local Fair Employment Practices Agencies 48
Past Performance and Recent Initiatives 51
  National Enforcement Plan 52
  Local Enforcement Plans 53
  1997–2002 Strategic Plan 56
  1998 Task Force Reports 57
Workload, Staffing, and Budget 59
  Workload and Staffing 59
  Budget 61
Staff Training on the ADA 62

4. Assessment of EEOC's Rulemaking and Policy Development 66
Title I Rulemaking and Policy Development 66
  Rulemaking 67
  Policy and Enforcement Guidance 72
    Policy and Enforcement Guidance Development 73
    Title I Policy and Enforcement Guidance 74
  Litigation as a Policy Development Tool 76
Initial Guidance on Major Provisions of Title I 77
  Who Is Protected? 77
  Discrimination Defined 78
  Defenses 79
    Business Necessity Defense 79
    Defense for Religious Entities 80
    Food Handling by an Individual with Infectious or Communicable Disease 81
Guidance on Defining Disability Under the ADA 81
  Background 81
  ADA's Definition of Disability 82
  Related Concepts and Issues 84
    Physical or Mental Impairments 84
    Substantial Limitation 85
    Major Life Activity 86
    Major Life Activity of Working 88
    Mitigating Measures 91
    Per Se Disabilities 98
Guidance on Determining Who Is a Qualified Individual with a Disability 102
  Qualifications Standards 102
  Defining "Qualified Individual with a Disability" 104
    Essential Function 105
    Reasonable Accommodation 107
    Business Justification 112
    Direct Threat 113
    Undue Hardship 114

5. Assessment of Enforcement Guidance on Title I Topics and Issues 117
ADA and Psychiatric Disabilities 117
  What Is a Psychiatric Disability Under the ADA? 118
    Identifying and Diagnosing Psychiatric Disabilities 119
    Personality Disorders as Disabilities 121
    The "Substantial Limitation of a Major Life Activity" Analysis and Psychiatric Disabilities 123
    Evidence of Psychiatric Disability 126
  Reasonable Accommodation 126
  Conduct 129
  Direct Threat 132
  Other Issues 133
Employer-provided Health Insurance, Disability, and Service Retirement Plan Coverage 134
  June 1993 Interim Enforcement Guidance 135
    Statutory and Regulatory Authority 136
    Disability-Based Distinctions in Employer-Provided Health Insurance 137
    Framework of Analysis 137
    What Is a Disability-based Distinction? 137
    Employer/Insurer Defenses and Burden of Proof 139

EEOC's Litigation and *Amicus* Positions on Long Term Disability 143
  Physical Versus Mental Disabilities 143
  Qualified Individual with a Disability 146
  HIV/AIDS 146
Interpreting the ADA on Health Insurance and Other Benefits 147
Preemployment Inquiries and Medical Examinations 147
  Statutory and Regulatory Authority 148
  The Pre-Offer Stage 149
    What Is a Disability-related Question? 149
    What Is a Medical Examination? 153
  The Post-Offer Stage 155
Workers' Compensation and the ADA 156
  Disabilities and Occupational Injuries 157
  Questions and Examinations 157
  Hiring and Return to Work Decisions 158
  Reasonable Accommodation 159
  Light Duty 159
  Exclusive Remedy Provisions 160
  Other Issues 160
Applications for Benefits and "Qualified Individual with a Disability" 161
  Introduction—Judicial Estoppel 162
  EEOC's Analysis 164
    Fundamentally Different Purpose and Standards in ADA 164
      Role of Representations Made in Applications for Disability Benefits 168
      Public Policy Reasons Supporting Conclusion 169
  Instructions to Investigators 170
Title I of the ADA and Labor Issues 170
  Early Attempts to Work with the National Labor Relations Board 171
  NLRB–EEOC Procedural Memorandum of Understanding 172
  Conflicts Between the Requirements of the ADA and Labor Practices 173
    Medical Information Confidentiality Requirement 173
    Reasonable Accommodation and the Collective Bargaining Agreement 174
    ADA Claims and Mandatory Arbitration 175
The Family and Medical Leave Act and the ADA 176
  Background 177
  Legislative Histories 177
    ADA 177
    FMLA 177
  Objectives 178
  Scope and Coverage 178
  Leave Policies 179
  Medical Certification and Employee Records 181
  Employee Health Benefits 181
  Extended Leave 182
  Continuing Need for Awareness and Education 182
Application of ADA to Conduct Overseas and Foreign Employers in the United States 183
  Discrimination by Employers Abroad 183
  Discrimination by Foreign Employers Within the United States 184
  Charge Processing Instructions 185

6. Assessment of Title I Enforcement Activities: Charge Processing 186
Priority Charge Handling Procedures 188
  Charge Intake 190
  Charge Categorization 192
    A, B, and C Charges 192
    Commissioner Charges 194
  Charge Investigation 197
    Investigations 197
    Determinations 200
  Charge Resolutions and Closures 201
    Settlements and Conciliations 201
    Alternative Dispute Resolution 201
    Litigation 206
Charges of Discrimination 210
  Charges Under All Statutes 212
  Charges Under the ADA 214
    Bases 214
    Issues 214
    Processing Time 216
    Benefits 219

7. Assessment of EEOC's Outreach, Education, and Technical Assistance . 220
ADA Technical Assistance Plan 223
  Outreach in the Development of Implementing Regulations 224
  Technical Assistance Manual 224
  Interagency Coordination 224
  Technical Assistance Plan 226
ADA Technical Assistance Program 226
  Phase I 226
  Funding 230
  Technical Assistance Revolving Fund and the TAPS Programs 231
  ADA Outreach, Education and Technical Assistance—FY 1993 to Present 232
  Local Enforcement Plans 234
  Headquarters and Field Office Management of ADA Technical Assistance Programs 235
  Outreach to Underserved Groups 238
Future of EEOC's Outreach, Education, and Technical Assistance Program 240

8. Findings and Recommendations 241

Statements

Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners A. Leon Higginbotham and Yvonne Lee 270
Commissioner Russell G. Redenbaugh 274

Appendices

A. ADA Charges by Bases 283
B. ADA Charges by Issue 284

Bibliography 286

Tables

2.1 Percent Disabled, by Age 10
2.2 Percent Disabled (Ages 15 to 64), by Race and Hispanic Origin 11
3.1 EEOC District, Area, and Local Offices 44
3.2 EEOC's Budget, Staffing, and Workload, Fiscal Years 1993–1997 58
6.1 Priority Charge Processing, by Office 195
6.2 EEOC Involvement in Cases by Issue 207
6.3 EEOC Involvement in Cases by Impairment 208
6.4 ADA Cases Litigated by EEOC District Offices 209
6.5 Characteristics of Charging Parties, by Statute 211
6.6 Months to Close Charge, by Processing Time 216

Figures

3.1 The Equal Employment Opportunity Commission 40
6.1 Processing Category by Statute 193
6.2 Closures by Statute 211
6.3 ADA Charges by Basis 213
6.4 ADA Charges by Issue 213
6.5 Processing Time: ADA Charges 215
6.6 Average Number of Days to Close ADA Charges 215
6.7 Processing Time by Priority 217
6.8 Charge Processing time Before and After Priority Charge Handling Procedures 218
6.9 Status of Open Charges 218

1 Introduction

On July 26, 1990, 26 years after the passage of the Civil Rights Act of 1964,[1] President George Bush signed the Americans with Disabilities Act (ADA) into law.[2] With enactment of this law, Congress provided a panoply of Federal civil rights protections for persons with disabilities. The law seeks to ensure for people with disabilities such rights as equal opportunity in education and employment; full accessibility to public accommodations, telecommunications, and health insurance; and a total commitment by Federal, State, and local governments to ensuring the rights of individuals with disabilities.[3]

The statement of findings for the ADA is compelling. Congress found that 43 million Americans had physical or mental disabilities and described in direct, powerful language the widespread discrimination faced by people with disabilities throughout our history.[4] Congress found that individuals with disabilities faced discrimination in "such critical areas, as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"[5] and that the discrimination took various forms, including "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."[6]

Congress noted that "historically, society has tended to isolate and segregate individuals with disabilities,"[7] that individuals with disabilities "occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally"[8] and finally that:

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[9]

Furthermore, individuals with disabilities, unlike others experiencing discrimination, had "no legal recourse to redress such discrimination."[10]

Congress stated that the Nation's proper goals with respect to individuals with disabilities are: "equality of opportunity, full participation, independent living, and economic self-sufficiency"[11] and that ongoing discrimination against individuals with disabilities prevented the accomplishment of these goals:

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[1] Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

[2] Pub. L. No. 101–336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (1994)).

[3] *See id.*

[4] 42 U.S.C. § 12101(a) (1994).

[5] *Id.* § 12101(a)(3) (1994).

[6] *Id.* § 12101(a)(5) (1994).

[7] *Id.* § 12101(a)(2) (1994).

[8] *Id.* § 12101(a)(6) (1994).

[9] *Id.* § 12101(a)(7) (1994).

[10] *Id.* § 12101(a)(4) (1994).

[11] *Id.* § 12101(a)(8) (1994).

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.[12]

To eliminate this invidious discrimination, Congress stated in the ADA's statement of purpose that it intends the statute:

- to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[13]

To meet the goal of a universal ban on discrimination against persons with disabilities, Congress created four separate titles in the act to prohibit the discrimination enumerated in the act's statement of findings. Title I of the act bans discrimination against persons with disabilities in employment.[14] Title II prohibits discrimination by State and local governments and requires that they ensure that all facilities, services, and information they provide are accessible to persons with disabilities.[15] Title III provides for nondiscrimination against persons with disabilities in public accommodations.[16] Finally, title IV of the act bans discrimination in telecommunications.[17] A fifth title in the statute contains miscellaneous provisions clarifying ADA's relationship to other laws and addressing such issues as health insurance.[18]

Although more than 6 years have passed since the ADA first took effect, its goals of ensuring equal employment opportunities and full accessibility to State and local government services and public accommodations are far from being met. For example, in a 1996 report, the National Council on Disability provided some disheartening statistics from a survey conducted for the National Organization on Disability. The report noted that:

> about 67% of individuals with disabilities aged 15 to 64 in the United States are unemployed but want to work and that 60% of Americans with disabilities are still not aware of ADA. Additionally, the survey shows that (a) only 47% of people with disabilities believe that others treat them as equals; (b) only 35% are satisfied with their lives in general, compared with 55% of people without disabilities; (c) that percentage of working-age Americans with disabilities who are unemployed (67%) is unchanged since 1986, although 79% say that they want to work; (d) 49% of students and employment trainees with disabilities expect to encounter job discrimination; and (e) 66% of students believe that their disability will have—or has had—a strong negative effect on their job opportunities.[19]

Although maintaining that without the ADA, "the chances of employing people with disabilities is remote," the executive director of the Oklahoma Disability Law Center wrote that even with the ADA, "the process of opening areas for employment is a long, slow one."[20] A media critic of the ADA has noted that "[t]he ADA's intended beneficiaries—blind, deaf, or wheelchair-bound Americans now on public assistance—are no more likely to be in the mainstream workplace now than in 1991. Most of the law's benefits have accrued to the already-employed. . . ."[21] The associate director of the

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[12] *Id.* § 12101(a)(9) (1994).

[13] *Id.* § 12101(b)(1)-(4) (1994).

[14] *Id.* §§ 12111–12117 (1994).

[15] *Id.* §§ 12131–12,165 (1994).

[16] *Id.* §§ 12181–12189 (1994).

[17] Pub. L. No. 101–336, § 401, 104 Stat. 327, 366 (codified in scattered sections of 47 U.S.C.).

[18] 42 U.S.C. §§ 12201–12213 (1994).

[19] National Council on Disability, *Cognitive Impairments and the Application of Title I of the ADA* (Washington, DC: National Council on Disability, Jan. 26, 1996), p. 3, citing Lou Harris and Associates, Inc., NOD/Harris Survey of Americans with Disabilities (New York, NY: Author, 1994).

[20] Kayla A. Bower, Executive Director, Oklahoma Disability Law Center, Inc., letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), U.S. Commission on Civil Rights (USCCR), Apr. 6, 1998, attachment, p. 1 (hereafter cited as Bower letter).

[21] Brian Doherty, "Unreasonable Accommodation: The Case Against the Americans with Disabilities Act," *Reason* (August/September 1995), p. 20 (hereafter cited as Doherty, "Unreasonable Accommodation").

State of Illinois' Office of Rehabilitation Services also noted that "the biggest impact that the ADA has had in regards to employment is for persons who are already hired and need assistance, be it accommodations or job retention."[22] He wrote that employers continue to be afraid to hire persons with disabilities because of the possibility that they might file lawsuits under the ADA, and employers also have "unwarranted fear" that the costs of accommodating individuals with disabilities will be high.[23]

The general counsel of the State of Connecticut's Office of Protection and Advocacy for Persons with Disabilities indicated that the ADA had opened up dialogues between employers and employees, but that it "remains unclear whether the employee obtained a job as the direct result of the ADA."[24] The executive director of the Georgia Advocacy Office wrote that "many businesses are willing to provide accommodations for persons with disabilities," but that her office had noted "some resistance to hiring persons with disabilities and the fabrication of a record of poor performance in order to terminate persons with disabilities."[25] A representative of the State of California Department of Rehabilitation noted that many companies "have incorporated ADA into their operational policy and have gone out of their way to recruit persons with disabilities," but that small businesses, in particular, have had a poor record with respect to recruitment and accommodation of individuals with disabilities.[26] A representative of the Paralyzed Veterans of America wrote that inaccessible public transportation remains a major barrier that makes it "impossible for [individuals with disabilities] to take advantage of employment opportunities."[27] The executive director of the Oklahoma Disability Law Center indicated that many of her agencies' clients do not even qualify for protection under the ADA, because they cannot perform the essential functions of a job, even with reasonable accommodation.[28]

However, some research evidence suggests that the ADA may have had a positive effect on employment of people with disabilities. Data from the Survey of Income and Program Participation show that the percentage of persons with severe disabilities who were employed grew from 23.3 percent in 1991 to 26.1 percent in 1994, an increase of 27 percent. According to these data, 800,000 more people with severe disabilities were employed in 1994 than in 1991.[29] The extent to which the ADA, as opposed to the improving economy, was responsible for the increase is unknown.[30]

According to the National Organization on Disability, which held conference calls with thousands of its community partners, despite these increases in the number of people with disabilities who are employed, a general consensus among members of the disability community is that the ADA has not done much to open up employment opportunities for people with disabilities who are unemployed.[31] The unemployment rate for people with disabilities remains much higher than for the population as a whole, and only slightly over one-quarter of persons with severe disabilities are working.[32] Furthermore, negative attitudes towards people with disabilities continue to pervade society. One disability leader told the Commission that fear of disability leads persons without disabilities either to avoid people with disabilities altogether, or to be overly helpful to them.[33] The need for a public relations campaign to change societal attitudes was a theme voiced by many of the people Commission staff spoke to during the course of the investigation.

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[22] Carl Suter, Associate Director, Office of Rehabilitation Services, Illinois Department of Human Services, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 9, 1998, attachment, p. 1 (hereafter cited as Suter letter).

[23] Ibid.

[24] Lawrence Berliner, General Counsel, Office of Protection and Advocacy for Persons with Disabilities, State of Connecticut, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, p. 2 (hereafter cited as Berliner letter).

[25] Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998, attachment, p. 1 (hereafter cited as Ringer letter).

[26] Michelle Martin, Staff Services Analyst, Department of Rehabilitation, Health and Welfare Agency, State of California, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, attachment, pp. 1–2 (hereafter cited as Martin letter).

[27] Susan Prokop, Associate Advocacy Director, Paralyzed Veterans of America, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 26, 1998, p. 1.

[28] Bower letter, attachment, p. 1.

[29] President's Committee on Employment of People with Disabilities, News Release, "Employment Rate of People with Disabilities Increases Under the Americans with Disabilities Act," July 22, 1996 (hereafter cited as President's Committee, "Employment of People with Disabilities Increases Under the ADA").

[30] John Lancaster, Executive Director, President's Committee on Employment of People with Disabilities, interview in Washington, DC, Oct. 14, 1997 (hereafter cited as Lancaster interview).

[31] Jim Dickson, Director of Community Affairs, National Organization on Disability, interview in Washington, DC, Mar. 3, 1998, p. 2 (hereafter cited as Dickson interview).

Although the ADA may not have substantially improved job opportunities for people with disabilities, it may have produced intangible benefits. One disability leader told the Commission that the ADA was "priceless" because it had captured the imagination of people with disabilities. Although it has not been the "magic bullet" some in the disability community originally thought it might be, the ADA has raised the expectations of people with disabilities.[34] Furthermore, the mere existence of the ADA appears to have affected a change in the way employers, State and local government agencies, and the general public perceive and treat people with disabilities. According to a National Institute on Disability and Rehabilitation Research grantee who provides technical assistance on the ADA, "Overall, we feel that there have been significant changes in the attitudes of employers, businesses and government officials since the implementation of the ADA."[35] An employer representative also has pointed out that the ADA has encouraged the development of assistive equipment and technology. As a result, she told the Commission, such devices have become more sophisticated and less expensive than they were previously; thus, "the 'reasonableness' of implementing such devices as reasonable accommodations increases, and the degree of hardship lessens substantially."[36]

Some media commentators have charged that the ADA has been too effective and its reach has extended far beyond what Congress intended. For instance, one commentator has written: "Physically incapable, mentally unstable, and alcoholic or addicted employees have again and again used new laws [the ADA and similar statutes at the State and local level] to hold onto safety-sensitive positions."[37] He provided several examples of cases where employers had been forced to employ or retain employees with disabilities in jobs where they posed a clear safety threat. Critics of the ADA also argue that it has been abused by people who do not have disabilities. For instance, a 1996 editorial piece in the *Washington Times*, citing a disability advocate, said, "The most frequent employment complaint under the ADA is from those already employed who only discover that they are disabled when facing dismissal or passed over for promotion."[38] The prevalence of back ailments among the charges of discrimination received by the Equal Employment Opportunity Commission often is cited as further evidence that the law is being used to benefit people who do not truly have a disability.

The costs that the ADA has imposed on employers have also been a subject of much of the criticism.[39] Data exist suggesting that most accommodations under the statute have been inexpensive. For instance, the Job Accommodation Network, a federally funded program that provides technical assistance to employers in providing reasonable accommodation under the ADA, has found that, among employers it has assisted, 70 percent report that the accommodations they made either cost nothing or less than $500.[40] A 1995 poll of corporations conducted by Louis Harris found that 80 percent of employers indicated that the ADA had not increased the costs of accommodating people with disabilities, and 82 percent felt that the ADA was worth the cost of implementation.[41] In addition, one legal scholar noted that there are tax and other benefits associated with hiring and accommodating individuals with disabilities.[42]

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[32] President's Committee, "Employment Rate of People with Disabilities Increases Under the ADA"; *see also* Lancaster interview, p. 5.

[33] Dickson interview, p. 3.

[34] Ibid., p. 5.

[35] Responses by National Institute on Disability and Rehabilitation Research Americans with Disabilities Act Technical Assistance Program grantees related to DOJ/EEOC Enforcement, Jan. 6, 1998, provided to the Commission by David Esquith, National Institute on Disability and Rehabilitation Research (OCRE files), p. 3 (hereafter cited as NIDRR, ADA Project Directors' responses).

[36] Ann Elizabeth Reesman, General Counsel, Equal Employment Advisory Council, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 2, 1998, p. 3 (hereafter cited as Reesman letter).

[37] Walter Olson, "Disabling America: Some Provisions of the Americans with Disabilities Act Threaten Public Safety," *National Review*, vol. 49, no. 9 (May 5, 1997), p. 40 (hereafter cited as Olson, "Disabling America").

[38] James Bovard, "Disability Intentions Astray," *Washington Times*, May 20, 1996, p. A6.

[39] *See, e.g.*, Doherty, "Unreasonable Accommodation," p. 20, stating: "Many presumed benefits [of the ADA] haven't yet blossomed, but the costs are all too real. Businesses as tiny as family-owned diners and corner dry cleaners are dodging regulators, in some cases paying tens of thousands in legal costs. Cash-strapped local governments are spending billions to comply with public-accommodation requirements."

However, others point out that the greatest cost associated with the ADA is litigation, not reasonable accommodation. One employers' representative has stated that many frivolous lawsuits have been filed under the ADA, and that these lawsuits cost an average of $12,000 each to defend.[43] Critics argue that these data fail to include nonpecuniary costs, such as managerial time and attention.[44] At least one newspaper column has indicated that unnecessary expenses may be incurred by State and local government entities under the guise of ADA compliance.[45] Others point out that discussions of the costs of the ADA should not ignore the benefits.[46] However, to date, no definitive scholarly research has been done that would permit an unbiased assessment of either the costs or the benefits of the ADA.[47]

Another major controversy that has arisen under the ADA is disagreement about whether the definition of disability under the ADA is too liberal or too restrictive. Many disability experts and advocates maintain that too often the Federal courts have made fundamental errors in interpreting the ADA, with the result that they have held wrongly that a plaintiff does not meet the ADA's definition of a qualified person with a disability and misguidedly throw out legitimate cases brought by people the law was designed to protect. For example, one disability advocate recently gave examples of cases she said were meritorious, but which the plaintiffs lost, because the courts held that they were not disabled under the ADA.[48] For example, in one case, a woman with breast cancer was able to maintain her work schedule during her radiation treatment. After she was fired, the court held that she was not disabled because her impairment had not substantially limited the major life activity of working[49]

On the other side of this controversy are critics who argue that the vague language of the ADA has allowed people without disabilities to "game the system" and bring frivolous lawsuits. For example, one author has said that the statute has spawned "opportunism" that has led to cases that are "patently absurd," such as the case of "the overweight fellow who sues for bigger seats in theaters, the guy who claims he brought a gun to work because of a psychiatric difficulty, . . . and the woman who claims her offensive smell is a protected disability."[50] However, statistics suggest that employers are more likely to prevail in ADA cases, and an article in the *Daily Labor Report* suggests that difficulties in satisfying legislative definitions and procedural provisions limit the ability of individuals to successfully show that they have experienced discrimination.[51] The article concluded that:

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[40] President's Committee on Employment of People with Disabilities, Job Accommodation Network, *Accommodation Benefit/Cost Data*, Mar. 30, 1997 (hereafter cited as President's Committee, *Accommodation Benefit/Cost Data*). However, 8 percent of employers reported that the accommodations they made cost between $2,001 and $5,000, and 4 percent reported that the cost of the accommodations they made was above $5,000. Ibid.

[41] President's Committee on Employment of People with Disabilities, Job Accommodation Network, "New Harris Poll Shows Business Supports ADA," undated.

[42] *See* Michael C. Collins, "Introduction—The ADA and Employment: How It Really Affects People with Disabilities," *Gonzaga Law Review*, vol. 28, no. 2 (1992/93), pp. 209–18.

[43] Mary Reed, National Federation of Independent Businesses, presentation at "Employment Post the Americans with Disabilities Act," conference in Washington, DC, Nov. 17–18, 1997.

[44] Walter K. Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: The Free Press, 1997), pp. 109–10.

[45] *See* Max Boot, "How George Bush is *Still* Raising My Taxes," *Wall Street Journal*, Mar. 16, 1998.

[46] The Job Accommodation Network also asked employers to report on benefits they realized from making accommodations. The median benefits reported were valued at $10,000. President's Committee, *Accommodation Benefit/Cost Data*.

[47] According to one critic of the ADA: "The ADA's total costs are impossible to estimate with certainty. All we can know about are individual cases, and even there most people don't want to talk. . . . The law rewards 'good faith' compliance, so it behooves any business owner or manager not to say anything publicly that might betray a lack of good faith toward the ADA or its application. Lawyers, pundits, consultants, city officials, trade group reps, even people forced to pay tens of thousands trying to obey the law, all emphasize they have no problem with the concept of the ADA, just the uncertainty and stringency of its application." Doherty, "Unreasonable Accommodation," p. 20.

[48] Arlene Mayerson, Disability Rights Education and Defense Fund, presentation at "Employment Post the Americans with Disabilities Act," conference in Washington, DC, Nov. 17–18, 1997, p. 12.

[49] Ellison v. Software Spectrum, Inc., 85 F. 3d 187, 191 (5th Cir. 1996).

> employees are treated unfairly under the Act due to myriad legal technicalities that more often than not prevent the issue of employment discrimination from ever being considered on the merits by an administrative or judicial tribunal. Moreover, when the merits are considered, the law still favors the employer.[52]

Critics of the ADA also argue that the Federal Government has been overzealous in its enforcement of the law and pushed it far beyond Congressional intent. Even supporters of the ADA, such as the Equal Employment Advisory Council, contend that the Equal Employment Opportunity Commission has "pushed the boundaries of [the ADA] in every conceivable direction" and taken positions that "defy common sense."[53] The firestorm that ensued recently when the Equal Employment Opportunity Commission issued enforcement guidance on people with psychiatric disabilities and the ADA is an example of the criticism of the agency's ADA enforcement. A 1997 editorial piece in the *Wall Street Journal* stated that under the guidelines, "[h]alf of Corporate America now qualifies as mentally disabled, and most of Wall Street."[54] Similarly, a nationally syndicated columnist criticized the guidance for including "a whole panoply of anti-social and/or uncooperative behaviors" as mental disorders and for "undermin[ing] our traditional understanding of character, behavior and personal responsibility."[55]

Although much has been said about overzealous enforcement of the ADA by the Equal Employment Opportunity Commission, other observers have told the Commission that they do not believe that the agency has been sufficiently aggressive in enforcing the law, although they often give the agency credit for trying. For instance, a person who provides technical assistance on the ADA to members of the disability community and others under a grant from the National Institute for Disability and Rehabilitation Research (NIDRR) told Commission staff that the basic perception in the disability community is that there is no enforcement of the ADA.[56] Another NIDRR grantee wrote, "The perception among people with disabilities and others in our region is that there is very little enforcement going on, yet we know that with the staffing available, there is a tremendous amount being accomplished. People are not seeing implementation at the community level."[57] Another NIDRR grantee wrote, "Basically, no federal agency with [ADA] enforcement responsibility is doing a great job."[58]

The news media have played an important role in shaping the debate over the ADA. However, some experts contend that coverage of the ADA in the news media has not always been balanced and accurate. They criticize the news media coverage for giving the impression that nothing but frivolous lawsuits are being filed under the ADA, while largely ignoring the poor judicial decisions that have unduly restricted coverage of the ADA contrary to congressional intent. Several individuals indicated that the news media "has occasionally painted an accurate picture of the requirements of the law" or pointed to instances of good media coverage of

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[50] Doherty, "Reasonable Accommodation," p. 20.

[51] *See* John Parry, "American Bar Association Survey on Court Rulings Under Title I of the Americans with Disabilities Act," *Daily Labor Report*, June 22, 1998, p. E–1—E–2 (hereafter cited as Parry, "ABA Survey." A study conducted by the American Bar Association suggests that, on average, in 92.1 percent of ADA cases in which a decision was made in favor of one side or the other, employers have prevailed. Ibid.

[52] Ibid., p. E–3

[53] Reesman letter, p. 5.

[54] Holman W. Jenkins, Jr., "Think Your Co-Workers Are Crazy? They Are," *Wall Street Journal*, May 13, 1997, p. A23.

[55] Mona Charen, "Frenetic Guidelines Straight From EEOC," *Washington Times*, July 31, 1997, p. A14.

[56] National Institute on Disability and Rehabilitation and Research, ADA Technical Assistance Program Project Directors' Meeting, Arlington, VA, Feb. 24–25, 1998, summary, p. 6.

[57] NIDRR, ADA Project Directors' responses, p. 2.

[58] Ibid., p. 5.

the ADA.[59] Several individuals praised, in particular, a segment on the ADA done by John Hockenberry of "Dateline" in the fall of 1997.[60] However, they were concerned that ADA coverage often is "sensationalistic and inaccurate,"[61] "inconsistent,"[62] "one-sided and distorted,"[63] and contains "extreme examples"[64] "negative 'scare' stories,"[65] and "lampoons."[66] The executive director of the Georgia Advocacy Office wrote:

> The news media has occasionally painted an accurate picture of the requirements of the [ADA]. However, many sensationalistic and inaccurate stories are more indelibly etched on our consciences. The stories of people who try to misuse or misapply the employment provisions of the ADA to hang onto a job or people who make federal cases out of petty matters seem to receive more coverage than the day-to-day stories of how the ADA works.[67]

The general counsel of the State of Connecticut's Office of Protection and Advocacy for Persons with Disabilities singled out newspaper editorials as being "especially biased with their negative portrayals of the ADA."[68] Unfortunately, to date, the public debate over the impact and enforcement of the ADA largely has been carried out in the media. Sufficient time has elapsed, however, since passage of the ADA for a more dispassionate and careful study of the ADA to be conducted.

Under the Commission's mandate to evaluate Federal civil rights enforcement, the Commission turns its attention to the ADA implementation and enforcement activities of the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice. In this report, the Commission examines how well the U.S. Equal Employment Opportunity Commission is fulfilling its mandate to implement and enforce the ADA's nondiscrimination prohibitions in employment under title I of the act. A companion report evaluates the title II, subtitle A, implementation and enforcement activities of the U.S. Department of Justice.[69] The reports evaluate each agency's regulations and policy guidance, participation in litigation, processing of complaints, and provision of technical assistance.[70]

The Commission previously examined civil rights protections for individuals with disabilities in a 1983 report, *Accommodating the Spectrum of Individual Abilities*.[71] The report, issued 7 years before enactment of the ADA, sought to answer questions about the purpose and content of existing civil rights laws and to provide an analysis of the legal principles on the rights and obligations arising under such laws. Its primary focus was reasonable accommodation, and one of its main aims was to dispel misconceptions about the high costs of providing reasonable accommodation to individuals with disabilities.[72]

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[59] Prokop letter, p. 1; Suter letter, p. 2 (noting that "[d]epending on the nature of the event, the media has been an ally and a detriment to the ADA movement. The media is to be commended for their touching portrayals of [persons with disabilities] and their struggles. . . . In the State of Illinois many local media outlets have done a superb job of covering events and developing stories pertaining to the ADA and [persons with disabilities].").

[60] *See, e.g.*, Carl Brown, Assistant Commissioner, Division of Rehabilitation Services, Department of Human Services, State of Tennessee, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, attachment, p. 1 (hereafter cited as Brown letter); Martin letter, attachment, p. 7.

[61] Ringer letter, attachment, p. 1.

[62] Berliner letter, p. 2.

[63] Prokop letter, attachment, p. 1 ("Too frequently, newspapers, magazines, radio and television offer one-sided or distorted pictures about the ADA and what it requires. There is a lack of understanding about terms such as 'reasonable accommodation' and misuse of certain terminology in the context of stories about the ADA. . . . Clearly, the media needs to do a better job of presenting balanced, accurate stories about the ADA").

[64] Brown letter, attachment, p. 1.

[65] David Eichenauer, Access to Independence and Mobility, fax to Nadja Zalokar, U.S. Commission on Civil Rights, June 4, 1998, p. 1 ("The ADA . . . has received very poor press. Even a majority of persons with disabilities do not understand the ADA. There are too many negative 'scare' stories about the ADA.").

[66] Martin letter, attachment, p. 7. *See also* Sutter letter, attachment, p. 2 (noting that "the media has tended to overkill such stories as inmates filing ADA charges, the in vitro fertilization ruling, and John Stossell of ABC news has been extraordinarily harsh on the ADA and portrays the legislation as costly and unnecessary.").

[67] Ringer letter, attachment, p. 1.

[68] Berliner letter, p. 2.

[69] The report does not include an evaluation of subtitle B of title II, which pertains to discrimination in transportation, and it also does not include any of the other ADA titles.

[70] The report does not assess the role of State and local fair employment practices agencies in enforcing title I. The report also does not address the seven other designated Federal agencies having title II responsibilities in areas such as transportation, agriculture, and education, nor does it evaluate the Department of Justice's oversight and coordination of the designated Federal agencies for title II.

[71] USCCR, *Accommodating the Spectrum of Individual Abilities*, Clearinghouse Publication 81 (Washington, DC: U.S. Government Printing Office, September 1983).

Eight years after passage of the Americans with Disabilities Act, many basic issues, such as who is protected by the act and what employers or other covered entities are required to do under the act, remain unresolved. In large measure, these issues arise out of inherent ambiguities in the language of the statute that have not been resolved by the implementing regulations or the Federal courts. Issues have also arisen as to how effectively the agencies charged with enforcing the ADA have processed charges of discrimination, and whether their technical assistance, outreach, and education have been successful in informing covered entities, the disability community, and the public at large as to rights and responsibilities under the act. Furthermore, broader issues exist, including whether the act has been successful in opening up opportunities for persons with disabilities and what has been the cost of compliance. These issues, and others that emerged as important during the course of the Commission's study, are examined in this report.

In preparing the report, Commission staff did a literature review and sought input from the disability community, disability experts, legal experts, and representatives of employers and State and local governments. Staff also analyzed and assessed numerous documents obtained from the Equal Employment Opportunity Commission and interviewed Equal Employment Opportunity Commission staff and officials. In addition, the Commission analyzed policy and complaint data from the agency.

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[72] Ibid., pp. 2–3.

2 Background

A comprehensive evaluation and assessment of the U.S. Equal Employment Opportunity Commission's implementation, compliance, and enforcement of title I of the Americans with Disabilities Act of 1990 requires an understanding of the context within which this agency operates. Essential to this understanding is broad knowledge of the characteristics and circumstances of people with disabilities, the people whom the law was designed to protect. Other important components of this understanding are knowledge of how the ADA fits into civil rights laws protecting people with disabilities, as well as disability policy in general, and of the history leading up to the passage of the ADA, including congressional intent in passing the law.

Statistical Profile of the Disability Community

A look at the disability community underscores the ADA's importance as a civil rights statute. The ADA potentially affords civil rights protections to more than one-fifth of the American population, and to a segment of the population that is disproportionately disadvantaged.[1]

Numbers of People with Disabilities

The ADA was designed to provide equality of opportunity to qualified individuals with disabilities. Because the ADA requires the determination as to whether an individual has a disability to be made on a *case-by-case* basis, it is not possible to know with precision the number of people protected by the act. However, it is certain that the number of persons protected under the ADA is in the tens of millions and growing rapidly.

In 1990, when the ADA was enacted, Congress relied on statistics indicating that 43 million Americans reported having disabilities.[2] These Americans came from all walks of life: every race,

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[1] Much of the data used to describe the characteristics of the population of individuals with disabilities come from the Survey of Income and Program Participation (SIPP) conducted by the U.S. Bureau of the Census. However, the definitions of "disability" and "severe disability" used by the SIPP are not precisely the same as the ADA definition of disability. According to the Bureau of the Census, "The term 'disability' can be defined narrowly or broadly depending on the interest of the analyst." *See* U.S. Department of Commerce, Bureau of the Census, "Americans with Disabilities: 1991–92," *Current Population Reports: Household Economic Studies*, P70–33, by John M. McNeil, December 1993, p. 1 (hereafter cited as Census, "Americans with Disabilities"). According to the National Institute on Disability and Rehabilitation Research, "the variety of statutory authorities for the collection of public data sets, and an inconsistently applied definition of disability have resulted in fragmented, incomplete, and inconsistent data sets about individuals." National Institute on Disability and Rehabilitation Research, *Chartbook on Disability in the United States, 1996*, by Lewis E. Kraus, et al., p. i. The National Council on Disability stated, "Lack of detailed and current data about people with disabilities remains an obstacle to effective policy development." National Council on Disability, *Achieving Independence: The Challenge for the 21st Century: A Decade of Progress in Disability Policy, Setting an Agenda for the Future* (Washington, DC: National Council on Disability, 1996), p. 26 (hereafter cited as NCD, *Achieving Independence*). Further, data currently used to measure disability are not always collected for that purpose. Methodologies differ among data sets and results often are not comparable. National Council on Disability, *Study on the Financing of Assistive Technology Devices and Services for Individuals with Disabilities: A Report to the President and the Congress of the United States* (Washington, DC: National Council on Disability, 1995), p. 22 (hereafter cited as NCD, *Study on the Financing of Assistive Technology Devices*). Nonetheless, researchers must rely on the data currently available.

[2] 42 U.S.C. § 12101(a)(1) (1994).

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color, and ethnicity; both men and women; all ages; and all socioeconomic classes. Their disabilities ranged from minor to severe, including both mental and physical disabilities. The ADA was targeted toward persons in this group, although every person who reports having a "disability" may not be protected by the ADA.[3]

By 1995 the number of Americans reporting disabilities had grown by 25 percent, to 54 million Americans, or almost 21 percent of the population. These persons reported that they had disabilities that limited their ability to perform functional activities, such as lifting and carrying objects, walking, using stairs, keeping track of money and bills, dressing, bathing, seeing, speaking, hearing, etc. Of these persons, 26 million (almost 10 percent of the population) reported their disabilities as "severe."[4] A severe disability includes the use of a wheelchair, long-term use of a cane or walker, inability to work at a job or do housework, or having certain conditions, such as a developmental disability or Alzheimer's disease.[5]

Critics of the ADA maintain that the number of people with "true" disabilities is actually much smaller than the 43 million figure relied on by Congress in passing the ADA or the 26 million figure representing the number of people with severe disabilities. One author charged that campaigners for the ADA exaggerated the number of people with disabilities for political reasons to ensure passage of the law.[6] He maintains that the number of people who are deaf, blind, or in wheelchairs—the people, according to him, government policy traditionally has focused on—is a much smaller number, less than 3 million.[7] However, the ADA adopted a broad definition of disability,[8] which clearly includes more than just people who are deaf, blind, or in wheelchairs. Thus, the number of people Congress intended the law to protect is much higher than 3 million and probably above 26 million, the number of people with "severe" disabilities.

TABLE 2.1
Percent Disabled, by Age

Age in years	Any disability	Severe disability
0 to 2	2.6 %	0.0 %
3 to 5	5.2	0.0
6 to 14	12.7	1.9
15 to 21	12.1	3.2
22 to 44	14.9	6.4
45 to 54	24.5	11.5
55 to 64	36.3	21.9
65 to 79	47.3	27.8
80 or more	71.5	53.5

Source: Census, "Americans with Disabilities," p. 2, figure 1. Data are from 1994–1995.

Socioeconomic Characteristics

Data on persons reporting disabilities reveal that they are a very diverse group. A commonality, however, is that persons with disabilities are disproportionately disadvantaged compared to nondisabled persons: a high percentage of persons with disabilities are elderly, members of minority groups, have low levels of education, have low income, and live in poverty—groups that traditionally have had limited opportunities. Furthermore, persons with disabilities rely heavily on support from Federal programs. Thus, the ADA targets its protections towards a disadvantaged and needy population. The promise of the ADA to open employment and other opportunities for full participation in the American economy and society to persons with

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[3] Disability is defined in the ADA as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarding as having such an impairment." 42 U.S.C. § 12102(2) (1994).

[4] Census, "Americans with Disabilities," p. 1. Data reported are from the 1994–1995 Survey of Income and Program Participation.

[5] Ibid.

[6] Walter Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: Free Press, 1997), p. 97. According to this author: "To reach the 43 million figure, advocates simply counted everyone over the age of 65 as disabled. They also roped in sufferers from health conditions like diabetes, cancer, epilepsy, and HIV infection even if those conditions caused no current debilitation, were controllable or indeed curable by medication, and were 'invisible' to job interviewers or other suspect classes. In short, they could just as well have picked a figure of 4 million or 143 million." Ibid.

[7] Ibid.

[8] See pp. 24–25 below for the definition of disability adopted by the ADA and chap. 4 for further discussion of ADA's definition of disability.

TABLE 2.2
Percent Disabled (Ages 15 to 64), by Race and Hispanic Origin

Race	Any disability	Nonsevere disability	Severe disability
White	17.7 %	7.4 %	10.3 %
Black	20.8	12.7	8.1
American Indian, Eskimo, Aleut	26.9	11.7	15.2
Asian and Pacific Islander	9.6	4.5	5.1
Hispanic origin (of any race)	16.9	9.1	7.8

Source: Census, "Disability."

disabilities holds forth the hope that, with full participation, persons with disabilities will achieve improved living circumstances and lower reliance on Federal programs.

Age, Race/Ethnicity, and Gender

The disability community crosses the boundaries of age, sex, race, and national origin. For example, disability is not limited to persons of certain ages, although the proportion of persons having a disability does rise with age. As shown in table 2.1, almost 13 percent of children aged 6 to 14 years have disabilities, and almost 13 percent of young adults (15 to 21 years old) have disabilities. Almost 15 percent of persons aged 22 to 44 years have disabilities. The percentage of people with disabilities rises to 24.5 percent for persons aged 45 to 54 years and almost half (47.3 percent) of persons aged 55 to 64 have a disability. The largest percentage of persons with disabilities is in the age category of 80 and above: 71.5 percent of persons 80 and older.[9] Thus, as we age we are more likely to become a part of the disability community.

Recent data suggest that the prevalence of disability is increasing. Between 1970 and 1981, the proportion of the population with disabilities that limited their activities to some extent grew from 11.7 to 14.4 percent. By 1994 the percentage of persons reporting activity limitation had risen to 15.0 percent.[10] One reason for this increase is that the disability rate of young adults has increased in the 1990s. In 1990 the proportion of adults aged 18 to 44 with activity limitation was 8.7 and 8.9 percent for men and women, respectively. By 1994 the proportion of young adults with activity limitation had risen to 10.2 percent for men and 10.3 percent for women.[11]

As shown in table 2.2, disabilities are found among persons of all races and national origins. However, the disability rate and the proportion of persons requiring assistance to accomplish daily activities differs by race, partly because of differences in age distributions among these groups.[12] Data from 1991 to 1992 show that, among persons ages 15 to 64, the disability rates for whites, blacks, and Hispanics, respectively, are 17.7 percent, 20.8 percent, and 16.9 percent.[13] The percentage of persons from those groups requiring personal assistance is 1.9 percent, 2.8 percent, 1.3 percent, respectively.[14] Asian and Pacific Islander Americans have the least prevalence of disability, with only 9.6 percent having a disability. American Indians, Eskimos, and Aleuts have the highest disability rate at 26.9 percent.[15] Approximately 0.8 percent of persons from these minority groups require personal assistance.[16]

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[9] Census, "Americans with Disabilities," p. 2, figure 1. Data are from 1994–1995.

[10] U.S. Department of Education (DOEd), Office of Special and Rehabilitative Services (OSERS), National Institute on Disability and Rehabilitation Services (NIDRS), *Disability Statistics Abstract: Trends in Disability Rates in the United States, 1970–1994*, no. 17, by H. Stephen Kaye et al. (Washington, DC: U.S. Department of Education, November 1996), p. 1 (hereafter cited as NIDRS, *Trends in Disability Rates in the U.S.*). Data reported are from the National Health Interview Survey of 1970, 1981, and 1994, conducted by the U.S. Bureau of the Census for the National Center on Health Statistics.

[11] Ibid., p. 4.

[12] DOEd, OSERS, NIDRS, *Disability Statistics Abstract: Need for Assistance in the Activities of Daily Living*, no. 18, by Jae Kennedy et al. (Washington, DC: U.S. Department of Education, June 1997), p. 2 (hereafter cited as NIDRS, *Need for Assistance in the Activities of Daily Living*). The age distribution is not equal among the race and ethnicity categories (and disability is more likely with age). For example, 14.7 percent of the white population are ages 65 and above, compared to 5.6 percent of the Hispanic population; 8.5 percent of the black population; 6.7 percent of the American Indian, Eskimo, and Aleut population; and 6.8 percent of the Asian and Pacific Islander population. Derived from U.S. Bureau of the Census, *Statistical Abstract of the United States: 1996*, 116th edition (Washington, DC: U.S. Government Printing Office, 1996), table 23 (hereafter cited as Census, *1996 Statistical Abstract*).

Education

Persons with disabilities, on average, have less education than the population as a whole. Discrimination or limited opportunities may have resulted in lower levels of educational achievement for persons with disabilities. The National Center for Education Statistics has measured the educational attainment of persons with various levels of disability, including disabilities that cause persons to be *unable* to work and disabilities that cause persons to be *limited* in the types of work they can perform. An estimated 45.2 percent of those who are unable to work have less than a high school education. For those who work full-time but are limited in the type of work they can do, 18.1 percent have less than 12 years of education, compared to 11.1 percent of persons with no work disability who work full time.[17]

Persons with disabilities have low high school graduation rates, and many of the students with disabilities who do graduate do not continue their education at postsecondary institutions. Persons with disabilities account for 23 percent of adults aged 25 to 64 who have not completed high school.[18] Only 6.3 percent of all students enrolled in undergraduate postsecondary institutions in the school year 1992–1993 had a disability. Of these students, 46.3 percent were attending school full time (compared to 52.9 percent of nondisabled students).[19]

Labor Force Status

Persons with disabilities are less likely to be employed than persons without disabilities.[20] This may be the result of discrimination, lower educational attainment, lack of training, or a combination of barriers arising from their disabilities. The overall labor force participation rate for persons with disabilities is significantly lower than that for nondisabled persons. In 1994, the labor force participation rate for persons with disabilities was 51.8 percent; for nondisabled persons, it was 83.0 percent.[21] Thus, approximately one-half of persons with disabilities were not working, compared to less than one-fifth of nondisabled persons.

Data from the Survey of Income and Program Participation indicate that employment rates vary considerably across types of disabilities. In 1990 only 18 percent of individuals with mental retardation or developmental disabilities and 23 percent of individuals with mental illness were working. However, almost one-half of people with visual impairments and bad backs were working, and two-thirds of people with hearing impairments held jobs.[22]

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[13] U.S. Department of Commerce, Bureau of the Census, "Disability," by John McNeil, accessed on Sept. 11, 1997, at http://www.census.gov/population/www/pop-profile/disabil.html (hereafter cited as Census, "Disability"). These data are based on 1991–1992 Survey of Income and Program Participation data.

[14] NIDRS, *Need for Assistance in the Activities of Daily Living*, table 3. Data reported are for 1990–1991.

[15] Census, "Disability."

[16] NIDRS, *Need for Assistance in the Activities of Daily Living*, table 3. This number represents the percentage of persons from all races other than white, black, and Hispanic.

[17] DOEd, OSERS, NIDRS, *Disability Statistics Report: Income and Program Participation of People with Work Disabilities*, no. 9, by Mitchell P. LaPlante et al. (Washington, DC: U.S. Department of Education, September 1996) table 1 (hereafter cited as NIDRS, *Income and Program Participation*).

[18] U.S. Department of Commerce, Bureau of the Census, "Americans with Disabilities," *Statistical Brief*, January 1994.

[19] DOEd, National Center for Education Statistics, *The Digest of Education Statistics 1996*, NCES 96–133, by Thomas D. Snyder (Washington, DC: U.S. Government Printing Office, 1996), table 206 (hereafter cited as NCES, *1996 Digest*). These data are based on the 1992–93 National Postsecondary Student Aid Study, conducted by the National Center for Education Statistics. Disabled students are defined as "those who reported that they had one or more of the following conditions: a specific learning disability, a visual handicap, hard of hearing, deafness, a speech disability, an orthopedic handicap, or a health impairment." Ibid.

[20] Census, "Americans with Disabilities," p. 3.

[21] DOEd, OSERS, NIDRS, *Disability Statistics Report: Trends in Labor Force Participation Among Persons with Disabilities, 1983–1994*, no. 10, by Laura Turpin et al. (Washington, DC: U.S. Department of Education, April 1997), table 1, pp. 22–23 (hereafter cited as NIDRS, *Trends in Labor Force Participation*).

Disability and gender also interact, resulting in different labor force participation rates for men and women with disabilities. Among persons with nonsevere disabilities, 85.1 percent of men and 68.4 percent of women are in the labor force (compared to 89.8 percent and 74.5 percent of nondisabled men and women, respectively).[23] These numbers reflect the national trends of decreased male labor force participation and increased female labor force participation,[24] although the labor force participation rate of persons with disabilities experienced more fluctuation.[25] Such differences were further differentiated by age.[26]

Income

Because persons with disabilities are less likely to work full time and attain high levels of education compared to nondisabled persons, they generally have lower incomes than their nondisabled counterparts. The severity of a disability also affects earnings potential. The median monthly earnings for nondisabled men is $2,190. Men with nonsevere disabilities earn a median monthly income of $1,857, while the median monthly income for men with severe disabilities is $1,262. Nondisabled women's median monthly income is $1,470; for women with nonsevere disabilities, median monthly income is $1,200 and for women with severe disabilities, is $1,000.[27]

Participation in Government Programs

Low income and the inability to work translate into the need for support from the Federal Government and other sources. Among the 13 million persons who receive means-tested assistance (cash, food, or rent), 50.6 percent are persons with disabilities.[28] The majority of these persons receive assistance in the form of social security disability insurance (SSDI), supplemental security income (SSI), medicare, and medicaid.[29] An estimated 4.6 million people receive SSDI and SSI. Of these persons, 95 percent of the male recipients and 87 percent of the female recipients are persons with disabilities.[30] Other forms of assistance received by persons with disabilities include veterans' benefits, workers' compensation, social security retirement and survivors' benefits (OASI), aid to families with dependent children (AFDC), and food stamps.[31]

Individuals with Disabilities as a Minority Group

The extent to which individuals with disabilities face prejudice and discrimination in the workplace or other aspects of their lives has been a subject of much debate. As noted in the previous chapter, in passing the ADA, Congress found that individuals with disabilities faced discrimination in "such critical areas, as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"[32] and that the discrimination took various forms, including "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."[33]

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[22] Paula Mergenhagen, "Enabling Disabled Workers," *American Demographics* (July 1997), p. 38, citing research by Michele Adler, U.S. Department of Health and Human Resources.

[23] Census, "Americans with Disabilities," p. 3.

[24] NIDRS, *Trends in Labor Force Participation*, table 2, pp. 24–25. In 1994, 86.9 percent of all men were in the labor force, compared to 70.6 percent of all women. These numbers represent an overall decrease of 1.3 percent for men and an increase of 10.0 percent for women between 1983 and 1994. Overall, the labor force participation of all persons aged 18 to 64 in the United States increased during the 1980s, but remained relatively stable during the early 1990s. Ibid.

[25] Ibid., p. 4. For example, the labor force participation rate for persons with disabilities increased by 6.4 percent from 1983 to 1994, while for persons without disabilities it increased by only 4.2 percent. Further, nondisabled men experienced a decline in 0.6 percent, compared to a 4.1 percent decline in labor force participation for men with disabilities. Women with and without disabilities experienced increases of 9.7 percent and 21.7 percent, respectively. Ibid., table 2, pp. 24–25.

[26] Ibid., table 2, pp. 24–25. Among all women, those 18 to 44 years in age experienced only a 6.1 percent increase in labor force participation from 1983 to 1994 compared to increases of 17.4 percent and 17.0 percent for women ages 45 to 54 and ages 55 to 64, respectively. This can be compared to increases of 5.5 percent, 21.3 percent, and 39.0 percent for the three age groups (18–44, 45–54, and 55–64), respectively, among women with disabilities over the period, and increases of 6.7 percent, 17.4 percent and 13.0, respectively, for the three age groups, among women without disabilities. Similar age differences in labor force participation were experienced by men.

[27] Census, "Americans with Disabilities," p. 4.

[28] Ibid.

[29] NIDRS, *Income and Program Participation*, tables 1 and 2. Data reported are for 1990.

[30] Ibid., p. 4. Data reported are for 1990. Persons with disabilities include those who reported that they have a work disability that either limits the kind or amount of work they are able to perform or renders them unable to work.

[31] Ibid., table 2. Data reported are for 1990.

Some argue that the prejudice and discrimination experienced by people with disabilities is similar to those faced by minorities such as African Americans and Hispanics. For instance, one person with a disability, blindness, expressed his conviction that a widespread fear of people with disabilities pervades society, and that this fear colors interactions between people without disabilities and people with disabilities in all aspects of life. He described his personal experiences of asking people on the street to give him directions and having some people pass him by, pretending not to hear him, and even quickening their pace to avoid him. He contrasted that reaction to the paternalistic reaction of others, who became "gushing," took him by the hand, and brought him to his destination. He also mentioned the difficulty he experiences in getting taxicabs to stop for him, a problem that afflicts a large number of people with disabilities.[34]

Thus, many people with disabilities see themselves as members of an oppressed minority group. One historian of the disability rights movement began his chronicle of the civil rights movement for people with disabilities by observing that "Pity oppresses." He described the growing pride many people with disabilities have come to take in being identified as disabled. He wrote, "like blacks, women, and gays before them, they are challenging the way America looks at them"[35] and that "millions of disabled people were getting angry, . . . and were coming to see themselves as a class, united in discrimination and empowered by law."[36] However, others suggest that the notion that people with a disability constitute a minority group, similar to other minorities, does not reflect reality. For instance, one author has pointed out that polls show that fewer than one-half of people with disabilities regard themselves as members of "a minority group in the same sense as blacks and Hispanics."[37]

Scholars have pointed to important distinctions between people with disabilities and African Americans and other minority groups. For instance, "unlike black Americans, the majority of persons with disabilities were not subject to discrimination in access to education or in employment during their childhood years. . . . Another important difference between the black and disabled minorities is the extreme heterogeneity of prejudice towards persons with different disabilities."[38]

Scholarly research suggests that prejudice, along with other factors, such as misinformation, is one of the sources of the lower employment rates and wages of people with disabilities. Studies of public attitudes towards people with disabilities indicate that these attitudes vary considerably by the type of disability, with very negative attitudes attaching to persons with epilepsy, mental and emotional illnesses, and alcohol and drug addiction.[39] There appears to be a correlation between how negatively the public views particular disabilities and the wage and employment differentials suffered by people with these disabilities.[40] A number of other factors, including difficulty in evaluating the likely productivity of applicants with disabilities, reluctance to bear the costs of accommodation and health insurance, and fear for worker safety, also enter into employers' decisions on hiring persons with disabilities.[41]

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[32] 42 U.S.C. § 12101(a)(3) (1994).

[33] *Id.* § 12101(a)(5) (1994).

[34] Jim Dickson, Director of Community Relations, National Organization on Disability, interview in Washington, DC, Mar. 4, 1998, pp. 3–4 (hereafter cited as Dickson interview).

[35] Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Times Books, 1993), pp. 13–14.

[36] Ibid., p. 332.

[37] Olson, *The Excuse Factory*, pp. 94–95.

[38] William G. Johnson and Marjorie Baldwin, "The Americans With Disabilities Act: Will It Make a Difference?" *Policy Studies Journal*, vol. 21 (1993), p. 779.

[39] *See* Marjorie L. Baldwin, "Can the ADA Achieve Its Employment Goals?" *Annals of the American Academy of Physical and Social Science*, vol. 549 (January 1997), p. 42.

[40] Ibid., pp. 42–43. Another researcher contends that prejudice is more directed towards people who were born with a disability than toward people who became disabled as

Federal Civil Rights Statutes from 1964 to 1988

Although the ADA was not enacted until 1990, several Federal statutes established the framework for the ADA's provisions against discrimination on the basis of disability. In particular, the Civil Rights Act of 1964[42] served as a model for future civil rights laws, including the ADA.[43] Title VII of the Civil Rights Act of 1964 identified five protected classes (race, color, national origin, gender, and religion) and made it clear that it is unlawful to discriminate based on personal characteristics such as these in employment.[44]

In the late 1960s, a number of Federal laws addressing the civil rights of persons with disabilities were enacted. One of the first laws addressing the needs of persons with disabilities was the Architectural Barriers Act of 1968.[45] This law required that certain federally financed buildings be accessible to persons with disabilities. The Urban Mass Transit Amendments Act of 1970[46] required that mass transit facilities and services be accessible to the elderly and persons with disabilities.

The Rehabilitation Act of 1973[47] opened more doors for Americans with disabilities. Sections 501 and 503 required the development of affirmative action programs for the hiring of persons with disabilities by Federal agencies and by parties contracting with the Federal Government, respectively. Section 502 established the Architectural and Transportation Barriers Compliance Board to ensure compliance with the Architectural Barriers Act of 1968. Section 504 prohibited entities receiving Federal financial assistance from discriminating on the basis of handicap.

The Education for All Handicapped Children Act of 1975[48] (renamed the Individuals with Disabilities Education Act in 1990)[49] required States receiving Federal financial assistance to provide a "free appropriate public education" to all children with disabilities. Such instruction was to be provided in the least restrictive setting possible.[50] In response to concern about the improper treatment of persons with mental retardation residing in institutions, the coordination of services and funding for persons with long-term disabilities was provided for by the Developmentally Disabled Assistance and Bill of Rights Act of 1975.[51]

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adults. *See* Johnson, "The Future of Disability Policy," p. 165.

[41] Baldwin, "Can the ADA Achieve Its Employment Goals?" p. 47.

[42] Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

[43] National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act* (Washington, DC: National Council on Disability, July 26, 1997), pp. 20–21 (hereafter cited as NCD, *Equality of Opportunity).*

[44] Pub. L. No. 88–352 § 703, 78 Stat. 241, 255–57 (codified as amended at 42 U.S.C. § 20003–2 (1994)).

[45] Pub. L. No. 90–480, 82 Stat. 718 (codified at 42 U.S.C. §§ 4151–4157 (1994)).

[46] Pub. L. No. 91–453, 84 Stat. 962 (codified as amended in scattered sections of 49 U.S.C. (1994)).

[47] Pub. L. No. 93–112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–796i (1994)).

[48] Pub. L. No. 94–142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)). The Education for All Handicapped Children Act of 1975 expanded the Education of the Handicapped Act of 1970 (Pub. L. No. 91–230, §§ 601–662, 84 Stat. 175 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994))). The Education of the Handicapped Act Amendments of 1983 (Pub. L. No. 98–199, 97 Stat. 1357 (codified at 20 U.S.C. §§ 1400–1461 (1994)) supported improved programs for persons with disabilities, parents, and special education teachers. Donald D. Hammill, "A Brief Look at the Learning Disabilities Movement in the United States," *Journal of Learning Disabilities*, vol. 26, no. 5 (May 1993). p. 298 (hereafter cited as Hammill, "A Brief Look at the Learning Disabilities Movement").

[49] Pub. L. No. 101–476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)). The Education of the Handicapped Act Amendments of 1990 (Pub. L. No. 101–476, § 901(a), 104 Stat. 1142 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994))) changed the name of the Education for All Handicapped Children Act to the Individuals with Disabilities Education Act (IDEA). The amendments also replaced references to "handicapped children" with "children with disabilities." *Id.* at § 901(b); *see also* Hammill, "A Brief Look at the Learning Disabilities Movement," p. 298.

[50] *See* Pub. L. No. 105–17, § 612(a)(5)(A) (1994 Supp. III); 34 C.F.R. § 300.550(B)(1) (1997); 34 C.F.R. § 104.34(a) (1997).

[51] Pub. L. No. 94–103, 89 Stat. 486 (codified as amended in scattered sections of 42 U.S.C.).

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In the 1970s, a disability rights movement began to solidify.[52] With examples set by activists in the late 1960s and early 1970s, particularly the Physically Disabled Students' Program at the University of California at Berkeley,[53] persons with disabilities recognized the civil rights implications of issues they faced daily. In 1977 the American Coalition of Citizens with Disabilities staged sit-ins and demonstrations to protest delay in issuing regulations implementing section 504 of the Rehabilitation Act.[54] Although the law had been enacted in 1973, changes in the presidential administration and concerns over costs and public reaction led to a delay in issuing the regulations.[55] Protesters remained at the Department of Health, Education, and Welfare regional office in San Francisco for 25 days demanding that the regulations be signed.[56] Section 504 regulations were issued soon thereafter.[57]

Also in 1977, the White House Conference on Handicapped Individuals was held. One of the conference recommendations was to establish an agency to coordinate Federal programs for persons with disabilities.[58] The following year the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978[59] established the National Council on the Handicapped as an advisory board within the U.S. Department of Education. Its role was to review and evaluate on a continuing basis all Federal policies, programs, and activities for persons with disabilities.[60] In 1984 the National Council on the Handicapped (later renamed the National Council on Disability[61]) was established as an independent Federal agency.[62]

Other Federal laws to assist persons with disabilities include the Civil Rights of Institutionalized Persons Act of 1980.[63] This law granted the U.S. Department of Justice the authority to sue State and local authorities operating an institution where there is a "pattern or practice" of flagrant violations of constitutional rights. The Telecommunications for the Disabled Act of 1982[64] required certain workplace and emergency telephones to be compatible with hearing aids. The Voting Accessibility for the Elderly and Handicapped Act of 1984[65] provided for physically accessible polling sites for Federal elections.

The Handicapped Children's Protection Act of 1986[66] ensured prevailing parents the right to receive an award of attorneys' fees and related costs for cases brought under the Act equivalent to the community compensation standards for similar cases. The Protection and Advocacy for Mentally Ill Individuals Act of 1986[67] authorized advocacy services for people with mental illness after their discharge from institutions. Also enacted in 1986, the Air Carrier Access Act[68] required accessibility to airlines for persons with disabilities. The Hearing Aid Compatibility Act of 1988[69] required newly manufactured telephones to be compatible with telecoil-equipped hearing aids. The Fair Housing Amendments Act of 1988[70] extended the Fair Housing Act of 1968[71] (which prohibited housing discrimination) to persons with disabilities and to all entities not receiving Federal funds.

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[52] Although some have emphasized the role of the "disability rights movement" in events that followed, others maintain that no such movement ever existed. For instance, one author argues that "many of the early demonstrations protesting ostensible government indifference were actually orchestrated from within the government itself. . . . [I]n 1973, when Congress enacted the first major federal initiative on [disability] (known as Section 504), it was under no grass-roots pressure from any organized disabled rights movement or any other source" Olson, *The Excuse Factory*, pp. 98–99.

[53] Shapiro, *No Pity*, pp. 50–53. The Physically Disabled Students' Program (PDSP) provided counseling and assistance for students with disabilities. The PDSP, and similar programs at other colleges and universities, encouraged independent living and self-sufficiency. Shapiro, *No Pity*, pp. 50–53.

[54] NCD, *Equality of Opportunity*, p. 13.

[55] Shapiro, *No Pity*, pp. 64–66. *See also* NCD, *Equality of Opportunity*, pp. 16–19.

[56] NCD, *Equality of Opportunity*, p. 19.

[57] 34 C.F.R. § 104 (1997).

[58] National Council on the Handicapped, *On the Threshold of Independence: A Report to the President and to the Congress* (Washington, DC: National Council on the Handicapped, January 1988), p. vii (hereafter cited as NCD, *On the Threshold of Independence*).

[59] Pub. L. No. 95–602, 92 Stat. 2955 (codified as amended at 29 U.S.C. §§ 701–794 (1994)).

[60] *Id.* at § 400.

[61] Pub. L. No. 100–630, § 205, 102 Stat. 3289, 3310 (codified as amended at 29 U.S.C. § 780 (1994)).

[62] Pub. L. No. 98–221, § 141, 98 Stat. 17, 26 (codified at 29 U.S.C. §§ 780 (1994)).

[63] Pub. L. No. 96–247, 94 Stat. 349 (codified as amended at 42 U.S.C. §§1997–1997j (1994)).

[64] Pub. L. No. 97–410, 96 Stat. 2043 (codified as amended at 47 U.S.C. § 610 (1994)).

[65] Pub. L. No. 98–435, 98 Stat. 1678 (codified as amended at 42 U.S.C. §§ 1973ee–1973ee–6 (1994)).

[66] Pub. L. No. 99–372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415 (1994)).

[67] Pub. L. No. 99–319, 100 Stat. 478 (codified as amended at 42 U.S.C. §§ 1001–10851 (1994)).

Laws such as these laid the groundwork and served as a model for the ADA. In particular, the Civil Rights Act of 1964, the Fair Housing Act of 1968, the Education Amendments of 1972[72] (which prohibited discrimination on the basis of sex in federally funded programs), and the Rehabilitation Act of 1973 set the standard for the ADA. Using knowledge of past civil rights legislation and efforts, the ADA would become a "state-of-the-art civil rights law."[73]

Legislative History and Final Provisions of the ADA

Overview of Legislative History

In its January 1986 report, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations*, the National Council on Disability (NCD) argued strongly for the creation of civil rights protections for people with disabilities. The report's primary recommendation was the advancement of "equal opportunity laws" for people with disabilities. NCD specifically proposed that Congress "enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap."[74]

With this language, NCD introduced the first statement of the Federal Government advocating the new civil rights law for people with disabilities that would become the ADA. Nonetheless, as NCD observed in its July 1997 report, *Equality of Opportunity: The Making of the Americans with Disabilities Act*, "Despite the tremendous amount of respect NCD [had] gained, however, Congress took little action—a great frustration to NCD members."[75] Former NCD Executive Director Lex Friedan is quoted in the report as stating:

> Although Congress pointed to *Toward Independence* as "the Manifesto, the Declaration of Independence for people with disabilities". . .NCD members and staff. . .were frustrated most by the lack of attention to their number-one recommendation, an equal opportunity law. . . . After waiting nearly a year, they began discussing what NCD could do. They concluded that the only way to overcome legislative inertia was for NCD to take the lead.[76]

By February 1987, disability rights attorney Robert Burgdorf had completed a draft of a legislative proposal for NCD. This draft legislative proposal was in the form of an equal opportunity law along the lines called for in NCD's report, *Toward Independence*.[77] For example, Burgdorf specified that the law should prohibit discrimination by the Federal Government, recipients of financial assistance, Federal contractors and subcontractors, employers, housing providers, places of public accommodation, persons and agencies of interstate commerce, transportation providers, insurance providers, and State and local government.[78] In addition, Burgdorf's draft legislative proposal required reasonable accommodation and affirmative steps to eliminate barriers.[79]

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[68] Pub. L. No. 99–435, 100 Stat. 1080 (repealed July 5, 1994).

[69] Pub. L. No. 100–394, 102 Stat. 976 (codified as amended at 47 U.S.C. § 610 (1994)).

[70] Pub. L. No. 100–430. 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (1994)).

[71] Pub. L. No. 90–284, §§ 801–901, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–3631(1994)).

[72] Pub. L. No. 92–318, §§ 901–907 86 Stat. 235(codified as amended at 20 U.S.C. §§ 1681–1688 (1994)).

[73] Statement by John Wodatch in U.S. Commission on Civil Rights, "Briefing on the Americans with Disabilities Act" (Washington, DC: U.S. Commission on Civil Rights), May 6, 1994, p. 12.

[74] National Council on the Handicapped, *Toward Independence: A Report to the President and to the Congress* (Washington, DC: National Council on the Handicapped, January 1986) (hereafter cited as NCD, *Toward Independence*).

[75] NCD, *Equality of Opportunity*, p. 68.

[76] Ibid., p. 61.

[77] Ibid., app. C, Chronology: The ADA's Path to Congress, p. 205.

[78] Ibid., p. 62.

At its quarterly meeting in May 1987, "NCD decided to move forward and give official sanction to crafting a legislative proposal, deciding that a comprehensive law . . . was the best way to protect disabled persons' rights."[80] In November of that year, NCD secured the sponsorship of Sen. Lowell Weicker,[81] as well as the support of Rep. Tony Coelho.[82]

On April 29, 1988, Representative Coelho introduced H.R. 4498, the Americans with Disabilities Act of 1988.[83] The bill stated as its main purpose "to establish a clear and comprehensive prohibition of discrimination on the basis of handicap."[84] The House Education and Labor Committee report accompanying the final version of the bill 2 years later echoed this language in stating: "The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring individuals with disabilities into the economic and social mainstream of American life."[85] During the 2 years from the bill's first introduction until its enactment, Congress held many hearings on the Americans with Disabilities Act.[86]

In September 1988, Congress began hearings on the proposed legislation. During hearings in the fall of 1988 and spring of 1989, the Senate Labor and Human Resources Committee, the Labor and Human Resources' Subcommittee on the Handicapped, and the House of Representatives Subcommittee on Select Education heard testimony from key figures in the disability community such as the Chairperson of the National Council on the Handicapped (now known as the National Council on Disability), the Chairperson of the President's Commission on the Human Immunodeficiency Virus Epidemic, the Chairperson of the Task Force on the Rights and Empowerment of People with Disabilities, and representatives from the Disability Rights Education and Defense Fund, the U.S. Chamber of Commerce, and the National Coalition for Cancer Survivorship.[87] These congressional committees also heard testimony from people with disabilities themselves, including Mary DeSapio, a cancer survivor; Joseph Danowsky, an attorney who is blind; and Amy Dimsdale, a college graduate with quadriplegia.[88]

A Senate subcommittee report on the hearings that took place during 1988 and 1989 stated that the testimony and reports presented to Congress drew the same fundamental conclusion, namely: "Discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications. . . . Current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas."[89]

Various committees held further hearings with testimony from additional key figures in the fall of 1989.[90] The testimony presented at

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[79] Ibid.

[80] Ibid.

[81] Ibid., p. 63.

[82] Ibid., pp. 63–64.

[83] H.R. 4498, 100th Cong. (1988). This bill was identical to the Senate bill, introduced in the Senate by Sen. Lowell Weicker (R–CT). *See* S. 2345, 100th Cong. (1988).

[84] H.R. 4498, 100th Cong. (1988).

[85] H.R. REP. NO. 101–485(II), at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304.

[86] *See* H.R. REP. NO. 101–485(II), at 24–28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 306–310.

[87] S. REP. NO. 101–116, at 4 (1989).

[88] *Id.* at 4.

[89] *Id.* at 6.

[90] *See* H.R. REP. NO. 101–485(II), at 26–27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 308. The report stated:

"On September 13, 1989, in Washington, D.C., the Subcommittee on Select Education and the Subcommittee on Employment Opportunities heard testimony from: Evan Kemp, Commissioner, Equal Employment Opportunity Commission; Jay Rochlin, Executive Director, President's Committee on Employment of People with Disabilities; Arlene Mayerson, Directing Attorney, Disability Rights Education and Defense Fund; Mark Donovan, Manager, Community Employment and Training Programs, Marriott Corporation; Duane Rasmussen, President, Sell Publishing Company; Paul Wharen, Project Manager, Thomas P. Harkins, Inc."

"On October 6, 1989, at University Place Conference Center, Indianapolis, Indiana, the Subcommittee on Select Education heard testimony from: Greg Fehribach, Chairman, Indiana Governor's Council on People with Disabilities and attorney, Timmons, Endsley, Chavis, Baker and Lewis; Barry Chambers, Commissioner, Indiana Department of Human Services; Deanna Durrett for Joseph Reum, Indiana Department of Mental Health; Muriel Lee, Governor's Planning Council for Persons with Disabilities; Jack Lewis, Professor of Sociology and Social Work, Anderson University, Indiana; David Reynolds, Indiana School for the Deaf, Janna these and the earlier 1988 hearings, as well as the remarks of House members and Senators themselves, provided persuasive evidence of the need to create positive change not just in the lives of people with disabilities but in the way that society views disability. For example, Sen. Tom Harkin spoke movingly about his brother's disability. Sen. Harkin said:

> My brother and millions like him are Americans with disabilities, but they are not disabled. . . . Indeed, by extension, it follows that the only thing a person in a wheelchair cannot do is walk. . . . The only thing a blind person cannot do is see. . . . There are things that all of us cannot do. Who among us can play basketball as well as Larry Bird? Who can pitch a baseball as fast as Orel Hershier? [sic] Who can tell a joke like Jay Leno?[91]

Senator Harkin further noted that even outside of the crucial contexts of employment and education, in everyday life and leisure activities persons with disabilities may experience enormous segregation that denies them simple participation. He quoted from a National Council on Disability report summarizing a 1988 Louis Harris poll:

> The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. The large majority of people with disabilities do not go to see movies, do not go to the theaters, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue. . . . The extent of nonparticipation of individuals with disabilities in social and recreational activities is alarming.[92]

In September 1988, Judith Heumann, then of the World Institute on Disability, testified about her personal experiences with disability:

> When I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard. I was forced to go into home instruction, receiving one hour of education twice a week for 3 ½ years. My entrance into mainstream society was blocked by discrimination and segregation. Segregation was not only on an institutional level but also acted as an obstruction to social integration. As a teenager, I could not travel with my friends on the bus because it was not accessible. At my graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair.[93]

In October 1989, Congress also heard powerful testimony from a number of witnesses, including Attorney General Dick Thornburgh, who stated on behalf of President Bush:

> Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this nation still lead their lives in an intolerable state of isolation and dependence. . . . Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.[94]

As with other civil rights statutes, such as title VI and title VII of the Civil Rights Act of 1964, Congress invoked its constitutional authority to regulate commerce as well as its duty to enforce the equal protection clause of the 14th amendment in establishing its purpose for passing the ADA.[95] Segregation and isolation were two of the principal equal protection related issues testified to by witnesses at the ADA hearings. Timothy Cook of the National Disability Action Council invoked the spirit of the 14th

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Shishler, law clerk for United States Magistrate John Paul Godich)." *Id.*

[91] 135 Cong. Rec. S10,711 daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

[92] 135 Cong. Rec. S10,712, (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

[93] *Hearing on H.R. 2273 Before the House Comm. on Education and Labor and Senate Comm. on Labor and Human Resources*, 100th Cong. 74–75 (1988) (statement of Judith Heumann, World Institute on Disability), *reprinted in* H. Rep. No. 101–485(II), 1 at 28–29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 311.

[94] *Hearing on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 191 (1989) (statement of Dick Thornburgh, Attorney General of the United States), *reprinted in* H. Rep. No. 101–485(II), at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 313.

[95] 42 U.S.C. § 12101 (b)(4) (1994).

amendment right to equal protection of the laws when he testified before Congress that: "As Rosa Parks taught us, and as the Supreme Court ruled . . . in *Brown v. Board of Education*, segregation 'affects the heart and mind in ways that may never be undone. Separate but equal is inherently unequal'."[96]

The general rationale for the statute derives from the concept of equal protection of the laws. Congressional testimony on the ADA addressed specific needs for equality of opportunity in such key areas as employment, education, and public accommodations and services. For example, Congress heard a great deal of testimony and offered numerous statements of its own on the need for including employment provisions in the ADA statute. House members and Senators spoke eloquently before Congress in arguing the need for strong equal employment opportunity provisions in the new law.

For example, in September 1989, Sen. Joseph Biden stated before the Senate that "[t]oo many disabled persons have been locked out of the American workplace, excluded from jobs for which they are more than capable."[97] Senator Lieberman stated:

> Two-thirds of Americans with disabilities between the ages of 16 and 64 are not working; however, 66 percent of working-age persons with disabilities say they want to work. . . . Fifty percent of adults with disabilities have household incomes of $15,000 or less. Discrimination which prevents people from finishing school, from finding jobs, and from earning a livable wage not only hurts the individuals who are discriminated against, it hurts our entire society.[98]

Debates Over the ADA Bill

In its report on the legislative history of the ADA, the National Council on Disability observed that during congressional hearings and debate on the ADA bill, "an ideological fault line emerged between the interests of the business and disability communities."[99] NCD identified six areas of debate influencing members of Congress during this crucial period.[100] NCD observed:

> Business groups had a number of overriding concerns. One was the "vagueness of language" contained in the ADA. Business lobbyists argued that such phrases as "undue hardship," "readily achievable," and "readily accessible," were inadequately defined, and would therefore invite frivolous law suits. Businesses, they argued, would not be able to know whether they were in compliance. A second concern was the potential cost of accommodations. One proposed solution was to have government share some of the burden through tax credits and other mechanisms. Third, numerous covered entities lobbied to have a more concrete definition of disability, ideally one that listed every covered disability instead of relying on a flexible definition. Fourth, small businesses argued that they should be exempt from the public accommodations requirements, or at least be phased in more gradually, because small businesses were exempt from other civil rights legislation. Fifth, scores of organizations protested the enforcement mechanisms available under the ADA, especially private litigation and the availability of punitive damages. Sixth, many business groups proposed that the ADA should preempt all other disability laws, so that there would be no confusion between different statutes, and no possibility for bringing multiple suits for one violation.[101]

These issues became divisive as members of Congress began introducing amendments to the original bill to respond to the concerns of the business community.[102] Despite strong sentiments in favor of the enactment of a new civil rights law for people with disabilities, the bill did not pass in 1989. Although Congress achieved broad consensus among its members in both the House and the Senate on the need for legislation affording equal employment opportunity and access to State and local government-provided services, controversy developed during the hearing and debate over the ADA bill based on the division between the disability and business communities noted in NCD's *Equality of Opportunity* report. Two broad areas of controversy emerged as members of Congress sought to meet the needs of their constituents either in the business or the disability communities. First, some Congress members expressed concern that the new legislation would create enormous costs for employers, particularly small businesses.[103] Second, there were concerns that the ADA would result in a major increase in frivolous litigation.[104]

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[96] *See* S. REP. NO. 101–116, at 10 (1989).

[97] 135 CONG. REC. S10,792 (daily ed. Sept. 7, 1989) (statement of Sen. Biden).

[98] 135 CONG. REC. S10,795 (daily ed. Sept. 7, 1989) (statement of Sen. Lieberman).

[99] NCD, *Equality of Opportunity*, pp. 130–31.

[100] Ibid.

[101] Ibid., p. 132.

[102] 135 CONG. REC S10,715–16, , S10,737–38 (daily ed. Sept. 7, 1989) (statements of Sen. Hatch). *See also* 136 CONG. REC. H,2421 (daily ed. May 17, 1990) (statement of Rep. Gingrich) (stating: "This is a bill which will affect, not only Americans with disabilities, but all Americans. It will affect the entire American economy, and it is very important that we make it possible for small businesses to make the transition, that we want to maximize the ability to keep jobs, and to keep the economy growing and to have better opportunities for all Americans." *Id.*).

Costs of ADA Compliance

Some members of Congress believed that the outlay needed for small businesses to provide reasonable accommodation would become an immense drain on their financial resources. For example, Senator Hatch sponsored two amendments to the bill that favored the needs of small businesses with respect to the costs of ADA compliance. The first provided an exemption from the requirements of the act for all employers with 15 or fewer employees.[105] The second was a tax credit to absorb the costs of offering reasonable accommodation to employees with disabilities. Senator Hatch spoke before Congress in favor of these provisions in September of 1989. He stated that:

> I have been concerned from the beginning about ensuring that the ability of small business to continue competing successfully was not compromised by this bill. . . . If we place unreasonable, suffocating obligations on these businesses, everyone loses—persons with or without disabilities that currently patronize those businesses and the employees at those businesses who may lose their jobs.[106]

Senator Hatch noted further in regard to the tax credit amendment:

> My first idea was merely to exempt businesses with 15 or fewer employees, but I felt that some businesses are so small that we should not be placing this type of burden upon them. The cost of accommodation might result in forcing them out of business and losing employment opportunities. . . we should take into consideration the burdens that are going to be placed upon small businesses. I think the tax credit approach is the appropriate remedy. The reason it is appropriate is because the Federal Government is imposing these obligations. Therefore, I also want the Federal Government to take some responsibility in sharing the obligations. . . The fact of the matter is that the Federal Government should help when it imposes these kinds of burdens. It is not fair if we do not do something to try and alleviate those burdens at least with regard to those who are the most vulnerable businesses in our society.[107]

The controversial issue of costs principally emanated from concerns over the need to create "a sensible limit to the responsibility of providing reasonable accommodations."[108] Senate leaders agreed on the employer defense of "undue hardship" as a mechanism for alleviating the costs of providing reasonable accommodation. During the Senate debate on the bill Senator Hatch expressed these concerns on "undue hardship" and "reasonable accommodation":

> there are some questions in my mind regarding the practical implications of the requirements of the legislation on certain situations. Specifically, I am thinking of the employment section of the bill, title I, and how the standards of "reasonable accommodation" and "undue hardship" would be applied across the board to the various industries and businesses in our Nation.[109]

To allay some of these concerns, Senator Hatch sought to clarify the precise meaning of the term "undue hardship" by asking Senator Harkin, one of the sponsors of the Senate bill, a series of questions. Senator Hatch specifically sought to clarify the extent of employers' obligations in providing reasonable accommodations to persons with disabilities in the Senate bill, S. 933. Senator Harkin clarified first that the type of accommodation provided would vary from setting to setting and that "no action on the part of the employer that is 'unduly costly, extensive, substantial, disruptive or that will fundamentally alter the nature of the program' is required."[110] Second, Senator Hatch clarified that where an employer faced an "undue hardship" as described by the above language, the employer did not have to make the reasonable accommodation.[111] Finally, Senator Harkin said that the factors to be considered under S. 933 in determining whether an undue hardship to the employer existed would include: (1) the overall size of the business (number of employees, number and type of facilities, and size of the budget); (2) the type of operation maintained by the employer, including the composition and structure of the employer's workforce; and (3) the nature and cost of the accommodation needed.[112]

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[103] *See, e.g.*, 105 CONG. REC. S10,714–17 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch).

[104] *See* 105 CONG. REC. S10,741 (daily ed. Sept. 7, 1989) (statement of Sen. Pryor).

[105] *See* 42 U.S.C. § 12111(5)(A) (1994).

[106] 135 CONG. REC S10,715 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch).

[107] 135 CONG. REC S10,715, S10,738 (daily ed. Sept. 7, 1989) (statements of Sen. Hatch). *See also* 136 CONG. REC. H2421 (daily ed. May 17, 1990) (statement of Rep. Gingrich).

[108] NCD, *Equality of Opportunity*, p. 115.

[109] 135 CONG. REC. S10,735 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch).

Congress ultimately included several mechanisms to compensate for the potential costs to employers. The final ADA bill included an exemption for small businesses with 15 or fewer employees[113] and the "undue hardship" provision.[114] In addition, the final bill included a provision offering employers a "direct threat" defense. Congress achieved broad consensus on this provision, which codified a 1987 decision of the U.S. Supreme Court under the Rehabilitation Act of 1973.[115] The ADA's direct threat provision states that "direct threat" "means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[116]

Concerns About Increased Litigation

The second issue that became the subject of heated controversy was the potential for more and perhaps often frivolous litigation. NCD observed:

> This fear built on the perception that phrases such as "reasonable accommodation," "undue hardship," "readily achievable," and "less effective," were inadequately defined, compelling courts to decide the meaning of the ADA.[citation omitted] It also stemmed from the belief that the remedies available under the ADA would invite frivolous law suits.[117]

The litigation concern related specifically to the terminology that determined the extent of coverage of the new statute. For example, in defining the term "disability," Congress sought to ensure that coverage extended to all individuals with mental or physical impairments significant enough to prevent them from performing a major life activity.[118] To this end, Congress defined "disability" in the statute as meaning "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."[119]

Legislative history documents on the ADA indicate that there was great concern about the potential of this language to create frivolous and unnecessary litigation. Senator Armstrong stated: "The Senate, and the committee, refused to list the mental impairments that are covered by the act; however, neither the Senate nor the committee left any doubt that the act is intended to cover 'any mental or psychological disorder'."[120] Senator Pryor, one of the cosponsors of the bill, observed more directly:

> Let us look at the definition that the ADA bill has for disability with respect to an individual. I quote: "A physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment or being regarded as having such impairment." . . . That is the definition which, in my opinion, is extremely loose. In my opinion, also, it is going to be the subject of liter-

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[110] *Id.* (statement of Sen. Harkin).

[111] *Id.* (statement of Sen. Hatch).

[112] *Id.* (statement of Sen. Harkin). *See* discussion on "Final Provision" for a listing of the factors the ADA lists for consideration in determining whether an undue hardship exists.

[113] *See* 42 U.S.C. §§ 12111(5)(A) (1994) (stating: "The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.").

[114] 42 U.S.C. § 12111(10) (1994).

[115] *See* School Board of Nassau County v. Arline, 480 U.S. 273 (1987).

[116] 42 U.S.C. § 12111(3) (1994).

[117] NCD, *Equality of Opportunity*, p. 111.

[118] 42 U.S.C. § 12102(2) (1994). *See also* S. REP. NO. 101–116, at 21–24 (1990).

[119] *Id.* § 12102(2) (1994).

[120] 135 CONG. REC. S11,174 (daily ed. Sept. 14, 1989) (statement of Sen. Armstrong).

ally countless issues of litigation in the courts across the country.[121]

The bill's sponsors sought to justify this terminology. For example, the Senate report accompanying the unenacted 1989 ADA bill helps to describe the extent of coverage by offering an example of what would constitute an impairment that did not create a "substantial" limitation. It explains that "persons with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity" and therefore not covered under the statute.[122]

The Senate report accompanying Senate bill S. 933 attempts to offer both justification for and clarification of the broad terminology "physical or mental impairment." The report states:

> It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases, and infections as: orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism. A physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a "substantial limitation of one or more major life activities." A "major life activity" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.[123]

Preemployment Inquiries

Some members of Congress also expressed concerns over other policy issues, including preemployment and medical inquiries and coverage of HIV/AIDS by the bill. For example, Sen. Jesse Helms did not want to limit employers' prerogatives in conducting preemployment inquiries by prohibiting their asking about a prospective employee's HIV status before a conditional offer of employment.[124] Senator Helms stated that if an employer "dares to ask a question about it [HIV status] before there is a conditional job offer, he is in the soup, according to this."[125] Senator Helms further stated in this context:

> What was the point in making him [the prospective employer] go that far? Why could he not sit down and say, son, I want to talk to you about several things that are important to me . . . Are you HIV positive? Are you this or that? Because your condition and beliefs are important to me. . . . Why can the employer not do that? Why does he have to go through all this rigmarole and get down to making a conditional job offer, at which point he has the right to ask the question? Why was that done? Why was that scenario set up?[126]

Senator Harkin explained to Senator Helms that "because even though the person may be HIV positive, he may still be qualified . . . He may be fully qualified."[127]

The main guidance offered in the ADA's legislative history on preemployment and medical inquiries is that any form of inquiry of a potential employee before a job offer is expressly prohibited. Senator Harkin explained that the rationale for this "is to ensure that employers do not inappropriately screen out people with disabilities at the initial stage of the application process by simply reacting to a prejudice or stereotype about a person's disability."[128]

HIV/AIDS

Others in Congress were not satisfied with Senator Harkin's explanation. HIV/AIDS became a focal point of debate. During the House debate over H. 2273, Representative Dannemeyer said that including HIV infection as a covered disability was not sound public policy. He stated:

> With this bill, in the form that it is now to be considered by the House, if it is adopted, every HIV carrier in the country immediately comes within the definition of

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[121] 135 CONG. REC. S10,741 (daily ed. Sept. 7, 1989) (statement of Sen. Pryor).

[122] S. REP. NO. 101–116, at 24 (1990).

[123] *See* S. REP. NO. 101–116, at 22 (1989).

[124] *See* 135 CONG. REC. S10,768 (daily ed. Sept. 7, 1989) (statement of Sen. Helms).

[125] 135 CONG. REC. S10,768 (daily ed. Sept. 7, 1989) (statement of Sen. Helms).

[126] *Id.* (statement of Sen. Helms).

[127] *Id.* (statement of Sen. Harkin).

[128] 135 CONG. REC. S10,767 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

> a disabled person. Why? Because they have a communicable disease. They are a carrier of a fatal virus that causes death.
>
> Is that sound public policy? And since 70 percent of those people in this country who are HIV carriers are male homosexuals, we are going to witness an attempt, or an utterance on the part of the homosexual community that, when this bill is passed, it will be identified by the homosexual community as their bill of rights.[129]

Others in Congress thought that HIV/AIDS and other contagious diseases should be addressed as public health hazards. For example, Representative Burton stated: "I think it is extremely important that we protect the public health of this Nation. If someone has a communicable disease, tuberculosis, AIDS, or something else, do my colleagues want them preparing their food or handling their food?"[130]

In response to this concern, the final bill contains a provision addressing the need to ensure safety with respect to the food supply. This provision states that a covered entity (employer) may refuse to employ anyone with an infectious disease if the dangers of transmission cannot be eliminated through reasonable accommodation.[131]

Final Provisions and Enforcement of Title I of the ADA

The full statement of purpose in the ADA reads:

> It is the purpose of this chapter—
>
> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[132]

The Americans with Disabilities Act defines an individual with a disability as a person who has:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.[133]

The ban on discrimination in title I reads:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[134]

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[129] 135 CONG. REC. H2,422 (daily ed. May. 17, 1990 (statement of Rep. Dannemeyer).

[130] *Id.* (statement of Rep. Burton).

[131] 42 U.S.C. §12113(d)(2) (1994). The provision requires the Secretary of Health and Human Services to publish an annual list of infectious diseases based on a review of all infectious and communicable diseases that may be transmitted through handling the food supply. 42 U.S.C. § 12113(d)(1). The requirement states that the Secretary of Health and Human Services shall, not later than 6 months after July 26, 1990, "(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply; (C) publish the methods by which such diseases are transmitted; and (D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public." *Id.*

[132] 42 U.S.C. § 12101(b) (1994).

[133] *Id.* § 12102(2) (1994).

[134] 42 U.S.C. § 12112(a) (1994). Discrimination as it is used in title I is defined in the following detailed manner as:

"(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

"(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

"(3) utilizing standards, criteria, or methods of administration—

"(A) that have the effect of discrimination on the basis of disability; or

"(B) that perpetuate the discrimination of others who are subject to common administrative control;

"(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an

Title I thus does not protect all individuals with disabilities from discrimination; it protects only "qualified" individuals with a disability, where "qualified" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[135] Title I places a responsibility on employers to make reasonable accommodations necessary for a qualified individual with a disability to perform the job. Although the term "reasonable accommodation" is not defined precisely, title I offers examples of what reasonable accommodation might include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[136]

Title I includes a prohibition against medical examinations and preemployment inquiries as to whether a job applicant is an individual with a disability or as to the nature or severity of such disability.[137] However, a covered entity may conduct preemployment inquiries "into the ability of an applicant to perform job-related functions."[138] A covered entity "may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant" under certain circumstances.[139] However, a covered entity cannot require a medical examination or make post-employment inquiries of employees unless "such examination or inquiry is shown to be job-related and consistent with business necessity."[140]

Title I specifically excludes current abusers of illegal drugs from coverage under its nondiscrimination provisions, stating:

> For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in

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individual with whom the qualified individual is known to have a relationship or association;

"(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

"(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

"(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure)."

[135] 42 U.S.C. § 12111(8), 12112(b) (1994). The statute does not offer a further definition or description of the term "essential functions." It only states that: "For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." *Id.*

[136] *Id.* § 12111(9) (1994).

[137] *Id.* § 12112(d)(1)—(2)(A) (1994).

[138] *Id.* § 12112(c)(2)(B) (1994).

[139] The statute allows post-offer examinations if:

"(A) all entering employees are subjected to such an examination regardless of disability;

"(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that -- (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

"(C) the results of such examination are used only in accordance with this subchapter." *Id.* § 12112(3) (1994).

[140] *Id.* § 12112(4)(A) (1994).

the illegal use of drugs, when the covered entity acts on the basis of such use.[141]

In addition, title I states that "a test to determine the illegal use of drugs shall not be considered a medical examination."[142] Title I does not prevent employers from taking adverse action on the basis of illegal drug use against employees or applicants who are "currently engaging in the illegal use of drugs."[143] Finally, title I states that "it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure" that individuals who are rehabilitated or former drug users "are no longer engaging in the illegal use of drugs."[144]

Title I also specifies several "defenses" that employers can use to avoid liability. For instance, title I allows a "business necessity" defense:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.[145]

Employers can claim that providing reasonable accommodation would result in an undue hardship. An undue hardship is defined as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)."[146] The factors used in determining whether an undue hardship exists are:

> (i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[147]

In addition, title I allows a so-called "direct threat" defense.[148] Employers may have as a qualifications standard that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[149] The statute defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[150] In response to concerns about communicable diseases as public health hazards, title I also allows, in certain circumstances, employers to offer a defense that an employee or applicant for a food handling position has an infectious or communicable disease that is "transmitted to others through the handling of food."[151] For this defense to pertain, the particular disease must appear on a list to be published annually by the U.S. Department of Health and Human Services and must not be able to be eliminated by reasonable accommodation.[152] Finally, religious organizations are permitted to give preference to individuals of a particular religion.[153]

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[141] *Id.* § 12114(a) (1994).

[142] *Id.* § 12114(d)(1) (1994).

[143] *Id.* § 12114(a) (1994).

[144] *Id.* § 12114(b) (1994) (stating: "Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who— (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs." *Id.*).

[145] *Id.* § 12113(a) (1994).

[146] *Id.* § 12111(10)(A) (1994).

[147] *Id.* § 12111(10)(B) (1994).

[148] *See id.* § 12113(b) (1994).

[149] *Id.* § 12113(b) (1994).

[150] *Id.* § 12111(3) (1994).

[151] *Id.* § 12113(d)(2) (1994).

[152] *Id.* § 12113(d)(2) (1994). This is followed by a provision stating: "Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, or-

Congress has charged various Federal agencies with implementing the nondiscrimination provisions of the ADA. Each agency has its own role and responsibilities fulfilling the requirements of the act. The U.S. Equal Employment Opportunity Commission (EEOC) is the agency primarily responsible for title I.

Congress required EEOC to issue its implementing regulations for title I within 1 year of the passage of the act. Accordingly, the EEOC issued its title I regulations on July 26, 1991.[154] These regulations became effective on July 26, 1992.[155] Under the requirements of EEOC's regulations, title I applied to organizations with 25 or more employees until July 26, 1994, when it became applicable to organizations with 15 or more employees.[156]

The U.S. Department of Justice (DOJ) is responsible for employment issues relating to State and local governments. Because such issues implicate both title I and title II of the ADA, DOJ and EEOC have issued a joint regulation describing the procedures for processing employment complaints that fall within the overlapping jurisdiction of both titles.[157] The regulation states that if the EEOC determines that it does not have jurisdiction under title I, the EEOC shall promptly refer the complaint to the Civil Rights Division at DOJ.[158]

The Role of Other Federal Agencies and Programs

Although the EEOC and DOJ have primary responsibility for enforcing title I and title II, subtitle A, of the ADA, respectively, several other Federal agencies and programs play a role in the implementation of the Americans with Disabilities Act.

President's Committee on Employment of People with Disabilities

The President's Committee on Employment of People with Disabilities is a small Federal agency that was created in 1947 by Executive Order. Its original purpose was to find and encourage employers to hire disabled veterans returning from World War II.[159] Over the years, the mission grew to include all persons with disabilities. Today, its mission is "to facilitate the communication, coordination and promotion of public and private efforts to enhance the employment of people with disabilities."[160] The President's Committee "provides information, training, and technical assistance to America's business leaders, organized labor, rehabilitation and service providers, advocacy organizations, families and individuals with disabilities" and "reports to the President on the progress and problems of maximizing employment opportunities for people with disabilities."[161] According to its Executive Director, the President's Committee is essentially a marketing and advertising agency, which advertises the employability of persons with disabilities.

The President's Committee plays an important role in providing technical assistance on the ADA, particularly providing information to em-

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dinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services." *Id.* § 12113(d)(3) (1994). Title I requires the Department of Health and Human Services to publish a list of infectious and communicable diseases that are transmitted through handling the food supply. *Id.* § 12113(d)(1) (1994).

[153] *Id.* § 12113(c) (1994).

[154] Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (1991) (codified at 29 C.F.R. § 1630).

[155] 56 Fed. Reg. 35,726 (1991).

[156] 29 C.F.R. § 1630.2(e) (1997).

[157] Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, 59 Fed. Reg. 39,898 (1994) (codified at 29 C.F.R. § 1640.

[158] 29 C.F.R. § 1640.6(b).

[159] John Lancaster, Executive Director, President's Committee on Employment of People with Disabilities, interview in Washington, DC, Oct. 16, 1997, p. 2 (hereafter cited as Lancaster interview).

[160] "President's Committee on Employment of People with Disabilities," undated information sheet provided to Commission staff by John Lancaster, Executive Director, USCCR/OCRE files (hereafter cited as President's Committee information sheet).

[161] Ibid.

ployers on how to provide accommodations required under the statute. One of the President's Committee's largest services is the Job Accommodation Network (JAN), which is operated under contract by West Virginia University.[162] JAN, whose mission is "to assist in the hiring, retraining, retention or advancement of persons with disabilities by providing accommodation information," operates a toll-free telephone information line, as well as an Internet Web site. JAN's telephone line is answered by professional consultants who can provide information on accommodation methods, devices, and strategies.[163] According to the Executive Director of the President's Committee, in 1996, JAN received approximately 85,000 calls from employers. These calls resulted in 22,000 persons with disabilities either being hired or retained. The large number of calls is an indication that information is reaching employers and that they are interested in the assistance the President's Committee can provide them, the Executive Director said. He stressed the need for technical assistance to be provided not only by enforcement agencies, such as EEOC and DOJ, but also by JAN and other nonenforcement agencies, such as the Disabilities Business and Technical Assistance Centers and independent living centers across the country. Both EEOC and DOJ list JAN as a source of information in their pamphlets. Furthermore, the President's Committee has set up a procedure with OFCCP so that employers are directed automatically to JAN for employment information.[164]

Another major function of the President's Committee is to disseminate public service announcements and publications to educate the public, including employers, persons with disabilities, and labor unions. The President's Committee also runs the Business Leadership Network. In this program, employers who are interested in hiring persons with disabilities educate other employers on disability-related topics. This program was in operation in approximately 7 States in 1997 and was expected to expand to 13 States in 1998.[165]

The President's Committee also runs two demonstration projects. The High School/High Tech program is operating in 17 cities. Under the program, President's Committee staff members locate producers or users of technology (such as NASA and NASA contractors) and work with them to provide paid summer internships for high school students with disabilities. The program has served more than 4,500 students with disabilities. Among last year's interns, 60 percent had emotional and learning disorders, and 40 percent had physical or developmental disabilities. Forty-five percent were from minority groups. The Committee is beginning to track this program and has found that many of the students go on to a 2- or 4-year school to study in technology fields.[166]

A second demonstration project is the Workforce Recruitment Program, operated in conjunction with the Department of Defense. This program identifies students who are ready for competitive work and are then entered into a database that is provided to potential employers. Initially limited to Federal employers, the program now includes private employers. In 1996, 1,500 students were interviewed for this program at 141 colleges or universities. Of these students, 1,200 were selected for inclusion in the database. Two hundred thirty-eight of the students participated in a summer internship program, and 30 found permanent employment. This program is expanding every year. Next year, three large temporary agencies will be involved in the project.[167]

Protection and Advocacy Systems

The national protection and advocacy (P&A) system is a federally funded program created by the Developmental Disabilities Assistance and Bill of Rights Act of 1975 to address concerns about mistreatment and abuse of persons with developmental disabilities.[168] Congress enacted the law in response to the "inhumane and despicable conditions" uncovered by investigative reporting into State-run institutions, such as Willowbrook in New York.[169] The purpose of the act was "to protect the human and civil rights" of individuals with developmental disabilities. The law established protection and advocacy agencies (P&As) in each State to provide legal representation and advocacy for such individuals. The P&As are public and private agencies designated by the Governor to be the State P&A. A national membership association for P&As, the National Association of Protection and Advocacy Systems (NAPAS), coordinates the work of and provides training, technical assistance, and information to the P&As. The State P&A agencies can only be redesignated for "good cause." As a result, there has been little change in the P&A system since the mid 1970s, when it first developed.

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[162] Lancaster interview, p. 2.

[163] President's Committee on Employment of People with Disabilities, "JAN Job Accommodation Network," undated information sheet provided to Commission staff by John Lancaster, Executive Director, President's Committee on Employment of People with Disabilities, USCCR/OCRE files (hereafter cited as JAN information sheet).

[164] Lancaster interview, p. 2.

[165] Ibid., pp. 2, 3.

[166] Ibid., pp. 2–3; President's Committee information sheet.

[167] Ibid.

[168] *See* Pub. L. No. 94–103 § 113, 89 Stat. 486,504 (codified as amended in scattered sections of 42 U.S.C.).

When the P&A system was first created, its mandate was restricted to protection and advocacy on behalf of people with developmental disabilities. Since then, Congress has expanded the mandate of the P&A system several times. In 1984 Congress added clients of vocational rehabilitation, the Client Assistance Program (CAP).[170] The CAP was established as a mandatory formula grant program under the 1984 amendments to the Rehabilitation Act to provide assistance to people with disabilities in obtaining information and access to the services, facilities, and projects available under the Rehabilitation Act.[171] In 1986, Congress enacted the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), which expanded the P&A program to include people with mental illness residing in 24-hour care facilities such as jails, prisons, and mental hospitals.[172] The Protection and Advocacy of Individual Rights (PAIR) program was established for all individuals with disabilities who are not eligible under the other programs and was funded as a national program in 1994.[173] The PAIR program serves as a catch-all program that theoretically serves the largest number of people since it covers a broad range of people with disabilities. However, in fact the PAIR program remains the smallest since it is the newest and the least well funded.[174] The PAIR program supports much of P&As' work under the ADA.

The protection and advocacy program is administered by three Federal agencies. The Administration of Developmental Disabilities at the U.S. Department of Health and Human Services (HHS) administers the original P&A program, Protection and Advocacy for People with Developmental Disabilities (PADD). The Rehabilitation Services Administration of the Office of Special Education and Rehabilitation Services at the U.S. Department of Education administers the CAP and PAIR programs; and the Center for Mental Health Services (CMHS), also at HHS, administers PAIMI.

The Executive Director of NAPAS indicated that the central mission of the P&A system is to respond to allegations of abuse, neglect, and violations of the rights of people with disabilities or discrimination based on their disability. P&As pursue legal, administrative, and other remedies on behalf of their clients. Although P&As are advocacy organizations for people with disabilities, they have authority to litigate and seek administrative remedies against institutions, including jails, prisons, hospitals, and mental institutions that abuse and neglect individuals. These are sometimes class action suits.[175] As noted above, under the PAIR program, P&As can file suits under the ADA on behalf of their clients.

National Council on Disability

The National Council on Disability is an independent Federal agency, composed of 15 members appointed by the President and confirmed by the U.S. Senate. Initially created in 1978 as an advisory board in the U.S. Department of Education, NCD became an independent agency in 1984. Its overall purpose is:

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[169] National Association of Protection and Advocacy Systems, *Annual Report of the P&A System 1996–1997* (Washington, DC: National Association of Protection and Advocacy Systems, 1997), p. 4 (hereafter cited as NAPAS, *Annual Report 1996–1997*). *See also* Curtis L. Decker, Executive Director, National Association of Protection and Advocacy Systems, interview in Washington, DC, Nov. 12, 1997, p. 2 (hereafter cited as Decker interview).

[170] 29 U.S.C. § 732 (1994).

[171] *See id.*

[172] *See id.* § 794e (1994).

[173] Decker interview, p. 3.

[174] Ibid., pp. 2–3.

[175] Ibid., p. 2.

> to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.[176]

NCD has no enforcement responsibilities with respect to the ADA or any other statute. Instead, its responsibilities include:

> reviewing and evaluating, on a continuing basis, policies, programs, practices, and procedures concerning individuals with disabilities conducted or assisted by federal departments and agencies . . . to assess the effectiveness of such policies, programs, practices, procedures, statutes, and regulations in meeting the needs of individuals with disabilities.[177]

NCD must also review and evaluate "new and emerging disability policy issues affecting individuals with disabilities at the federal, state, and local levels, and in the private sector. . . ." NCD is also charged with:

> making recommendations to [illegible] President, the Congress, the Secretary of Education, the Director of the National Institute on Disability and Rehabilitation Research, and other officials of federal agencies respecting ways to better promote equal opportunity, independent living, and inclusions and integration into all aspects of society for Americans with disabilities.[178]

With respect to the ADA, NCD is tasked with "gathering information about the implementation, effectiveness, and impact" of the law. NCD publishes an annual progress report on national disability policy for the President and Congress.[179]

Explaining how NCD carries out its mandate, the agency's General Counsel told the Commission that NCD's mandate is to track ADA enforcement, but that the agency does not have the power, or the staff, to coordinate ADA efforts across agencies. The agency measures its success by the number of its recommendations implemented by other agencies. In making recommendations, NCD works to ensure that it has grassroots support from the disability community, so that there is a constituency that will help ensure the recommendations are implemented.[180]

National Institute on Disability and Rehabilitation Research

The National Institute on Disability and Rehabilitation Research (NIDRR) began development of a $5 million ADA technical assistance initiative shortly after the passage of the ADA.[181] NIDRR issued a proposed priority establishing 10 technical assistance centers, called disability and business technical assistance centers (DBTACs), one in each of the U.S. Department of Education's 10 regions. These initial grants ran for 5 years, ending in 1996. At that time, NIDRR issued a new proposed priority for 10 new DBTACs. As of January 1998, the program was in the second year of its second cycle. The budget was $6.2 million.[182] The DBTACs:

> focus on providing, within their respective regions, materials, technical assistance, and training to businesses, persons with disabilities, state and local government agencies, and others to facilitate appropriate implementation of the ADA, successful outcomes for individuals with disabilities, and greater accessibility in public accommodations.[183]

The DBTACs also develop resources, such as databases, reference guides, and expert consultant pools, to assist in the technical assistance programs and promote public awareness of the ADA. Each DBTAC has a network of State affiliates and coalitions of organizations concerned with disability issues (including businesses, State and local government agencies, and disability groups) in each State.

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[176] NCD, *Achieving Independence*, app. F, "Description of the National Council on Disability," p. 187.

[177] Ibid.

[178] Ibid., p. 188.

[179] Ibid.

[180] Andrew Imparato, General Counsel, National Council on Disability, interview in Washington, DC, Oct. 20, 1997.

[181] David Esquith, Policy and Planning Division, National Institute on Disability and Rehabilitation Research, interview in Washington, DC, Jan. 8, 1998, p. 2 (hereafter cited as Esquith interview).

[182] DOEd, OSERS, NIDRR, *Report of the Americans with Disabilities Act (ADA) Technical Assistance Program*, The NIDRR Fifth Year (FY 1996), prepared by the ADA Technical Assistance Coordinator Contract (hereafter cited as NIDRR, *Report of the ADA Technical Assistance Program*); Esquith interview, p. 2.

[183] Ibid., p. v.

The DBTACs play an important role in disseminating information and technical assistance relating to the ADA throughout the country. According to NIDRR staff overseeing their activities, the DBTAC program has been concerned since its inception about quality control and about establishing a reputation for issuing solid, legally sufficient material. To this end, the DBTAC program has a working relationship with DOJ and EEOC. These agencies review all written material prepared by a DBTAC or any of NIDRR's grantees for legal sufficiency. In addition, NIDRR has established liaisons at EEOC and DOJ to assist the DBTACs in answering questions that require the expertise of those agencies. Each DBTAC has access to an information specialist at DOJ and EEOC headquarters. The DBTAC project directors hold semi-annual meetings. At each of these meetings officials from DOJ and EEOC brief NIDRR and DBTAC staff. In turn, the DBTACs relate to EEOC and DOJ staff any major concerns or issues in their respective regions.

NIDRR has been very concerned with ensuring that DBTAC staff stays current and is aware of recent policy developments in the field.[184] The DBTACs incorporate changes in the law in their training. In addition, the DBTACs train their State affiliates on these developments. Depending upon the magnitude of the legal or policy development, the DBTACs will issue newsletters that go out to all of their customers. The DBTACs have regular publications that they send to their customers, free of charge, although the DBTACs enclose an optional reimbursement request for expenses with all materials they distribute. NIDRR's policy is never to refuse to send anyone any material due to inability to pay.[185]

A Broader Context: America's Disability Policy

Although the ADA often is thought of as the culmination of a long line of statutes extending civil rights protections to different groups of Americans, it also needs to be understood as a major new component of the Nation's broader policy towards people with disabilities. With the exception of section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act is the only major component of the set of programs that constitute America's disability policy that is premised on a recognition that people with disabilities have a right and, indeed, a responsibility to work. The Americans with Disabilities Act sets a goal of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[186] Most of the rest of the Nation's disability policies are premised on what has been termed a "medical" or "charity" model of disability. Under this model, people with disabilities are injured, or limited, and deserve assistance in the form of health care, vocational rehabilitation, and, when they cannot work, income supports.[187] Based on the medical model, over the years, the United States has put in place a variety of supports for people with disabilities. The largest of these is the social security disability insurance (SSDI) program, which provides benefits to individuals covered under the social secu-

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[184] However, a NIDRR grantee has found that the DBTACs are not well-prepared to provide technical assistance on issues related to psychiatric disabilities. Matrix Research Institute, "Responses to the Americans with Disabilities Act Project Questionnaire," February 1998, enclosure to Barbara Granger, Director of Training and Dissemination, Matrix Research Institute, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 19, 1998.

[185] Esquith interview, p. 4.

[186] 42 U.S.C. § 12101(8) (1994).

[187] *See* Mary Louise Breslin, Disability Rights Education and Defense Fund, presentation at "Employment Post the Americans with Disabilities Act," conference in Washington, DC, Nov. 17–18, 1997 (hereafter cited as 1997 Post-ADA Conference), p. 5. Ms. Breslin summarized the history of disability policy as follows: Up until the 1970s, the policy was based on pity, which is in conflict with the civil rights goals of today. Science and medicine had a role in creating the pity/charity model of disability policy, starting with the eugenics movement and Social Darwinism and the view that there is a "normal person." The original hostility was replaced with pity, which correlates with segregation. This left a legacy of institutionalization and a belief that persons with disabilities were abnormal. It also led to doctors' being charged with making determinations of whether a person was disabled. Ms. Breslin continued that under the charity/medical model of disability, persons with disabilities are perceived as unable to work. People who are able to work are not disabled. There is no middle ground between dependence and unsupported work. She added that the disability benefit programs are critical, but they give the message of incapacity.

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rity program who no longer are able to work. Other programs include supplemental security income (SSI) instituted in 1974 for individuals with disabilities who were not eligible for SSDI, State workers' compensation programs, and disability coverage for servicemen provided by the Department of Veterans' Affairs.[188]

According to the National Council on Disability, "[d]esigned as a safety net for people who are terminally ill or too severely disabled to work, Social Security Programs for people with disabilities have had the unintended effect of trapping people with disability in lifetimes of poverty."[189] A number of studies has documented that labor force participation rates of individuals with disabilities declined as disability benefits became more generous, particularly during the decade of the 1970s. For instance, one researcher writes that "between 1970 and 1978, the number of workers on the [disability insurance] rolls nearly doubled, from 1.5 million to 2.9 million, and expenditures quadrupled. . . . Over roughly the same period, the number of people returning to work fell to an all-time low. . . ."[190] Researchers have attributed the declining labor force participation rates among individuals with disabilities to work disincentives created by the Nation's disability benefits programs.

Participation in either SSDI or SSI usually confers coverage by medicaid or medicare and hence provides health care benefits to people with disabilities participating in the programs. Thus, SSDI/SSI participants who choose to join the work force and become employed not only lose their SSDI/SSI benefits, but also lose health care coverage. Generally, the new employers of former program participants either do not offer health care insurance or offer health care insurance that excludes prior conditions, including medical costs related to their disability. One disability researcher has explained that these "disincentive effects of the health care coverage provided by [disability benefits] programs" can overpower any incentive to work provided by the ADA:

> Consider, for example, a person with a disability who is faced with the choice of applying for a [disability benefits] program or going to work for an employer who will provide the accommodations needed for the person to work because of the influence of the ADA. Assume further that the employer does not have group coverage for his workers or that the group coverage that is provided has many . . . exclusions. Even if the job offers a wage substantially greater than the disability benefits that would be provided by [the disability benefits program], the difference is unlikely to offset the value of a lifetime of guaranteed health care coverage to a person with a chronic condition.[191]

The National Council on Disability reported that "[a]bout 9.2 million people with disabilities receive Medicaid and/or Medicare, largely as a result of being on Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI)" and that "[p]eople with disabilities frequently list the lack of access to adequate and affordable health insurance as a major barrier to employment."[192]

The disincentive effects of disability benefits programs have been widely recognized. According to one economist's analysis of the Nation's disability policy:

> the principal thrust of disability policy in the United States continues to be providing transfer payments to

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[188] *See* William G. Johnson, "The Future of Disability Policy: Benefit Payments or Civil Rights?" *The Annals of the American Academy of Physical and Social Sciences* (January 1997), pp. 160–63.

[189] National Council on Disability, *Achieving Independence: The Challenge for the 21st Century: A Decade of Progress in Disability Policy, Setting an Agenda for the Future* (Washington, DC: National Council on Disability, July 26, 1996), p. 72 (hereafter cited as NCD, *Achieving Independence*).

[190] Carolyn L. Weaver, "Incentives Versus Controls in Federal Disability Policy," ch. 1 in Carolyn L. Weaver, ed., *Disability and Work: Incentives, Rights, and Opportunities* (Washington, DC: The AEI Press, 1991), p. 4 (hereafter cited as Weaver, *Disability and Work*). *See also* Sherwin Rosen, "Disability Accommodation and the Labor Market," ch. 2 in Weaver, *Disability and Work*, p. 20. Rosen summarizes the findings of research as follows: "Cotterman and Raisian calculate that during the decade of the 1970s the proportion of the disabled not working increased among virtually all age and sex groups. . . . The growth of social security disability payments has been directly linked to this phenomenon," citing Robert F. Cotterman and John Raisian, "The Incidence of Disability 1970 to 2020: A Public Policy Dilemma?" report submitted to the National Council on the Disabled (Washington: DC: Unicon Research Corp., May 1988) and Donald O. Parsons, "The Decline in Male Labor Force Participation," *Journal of Political Economy*, vol. 88, no. 1 (February 1980), pp. 117–34.

[191] Johnson, "The Future of Disability Policy," p. 171.

[192] NCD, *Achieving Independence*, pp. 81, 82.

> those labeled "unable to perform any substantial gainful activity." Until both the disability community and policymakers take the risk of shifting from a disability policy primarily based on transfers to one based on the proposition that people with disabilities can and should be expected to work, a new and growing population of young people with disabilities can look forward to a life of dependency.[193]

Another author has written:

> The Social Security program's expansion greatly steepened the "welfare trap" by which recipients find themselves not much better off financially (and often worse off) if they take a job than if they stay home.. . . Indeed, [the] welfare trap [faced by people with disabilities is] deeper than that of the much discussed (and smaller) Aid to Families with Dependent Children program, simply because it [is] much more generous.[194]

Another expert wrote to the Commission:

> Social Security . . . benefits provide a financial disincentive for persons with disabilities to return to work. . . . It is my belief that health insurance continues to be one of the most significant area for disincentives for return to work for persons who have been chronically ill, such as those who have been on Social Security benefits. Without addressing this issue, many of those who have been unemployed will continue to not feel confident that they should pursue meaningful work and reduce or eliminate their need for the health insurance coverage that comes with Social Security insurance.[195]

The associate director of the State of Illinois' Office of Rehabilitation Services wrote:

> The ADA needs to address the rights of [persons with disabilities] regarding such items as Vocational Rehabilitation, SSI, SSDI and health benefits. For example, there needs to be a more definitive policy regarding disabilities and company health insurance. There is such a wide variance of health insurance policies, that a person who receives disability benefits and medicare and Medicaid is often in a better position not to return to the labor force. Since one of the private sectors [sic] biggest fears is the cost of health insurance for [persons with disabilities], there needs to be a system prepared by federal and state governments to guarantee health benefits for persons with disabilities to open up more employment opportunities.[196]

Thus, the Nation's traditional disability benefit and health insurance system provides disincentives to paid employment that are at odds with the ADA's goal of ensuring equal employment opportunity to people with disabilities. In fall 1997, a national conference held in Washington, D.C., on "Employment Post the Americans with Disabilities Act" underscored the contradictions between the ADA and traditional disability benefit policies.[197] A major theme of the conference, which included Federal and State officials and policy makers, disability advocates, service providers, disability researchers, employers, and consumers, was that there is a fundamental conflict between much of disability policy, particularly SSI and SSDI benefits, and the ADA.[198]

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[193] Richard V. Burkhauser, "Post ADA: Are People with Disabilities Expected to Work?" *Annals of the American Academy of Physical and Social Sciences*, vol. 549 (January 1997), p. 72 (hereafter cited as Burkhauser, "Are People with Disabilities Expected to Work?").

[194] Olson, *The Excuse Factory*, p. 92.

[195] Suzanne M. Bruyère, Director, ILR Program on Employment and Disability, Cornell University, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 11, 1998, enclosure, p. 2.

[196] Carl Suter, Associate Director, Office of Rehabilitation Services, Illinois Department of Human Services, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 9, 1998, attachment, p. 2. Mr. Suter also recommended changes to the Vocational Rehabilitation system: "The ADA should also be used as the measuring stick for eligibility for Vocational Rehab services offered by the federal and state governments. The present policy in place nationwide is to service a small section of the disability community based upon the 'Order of Selection. If the ADA guidelines were used to determine eligibility, more persons with disabilities would be served. There would also have to be a correlation of increased funding for the states. Many [persons with disabilities] fall through the cracks because of differing eligibility criteria." Ibid.

[197] The purpose of the conference was "to engage national and state policy leaders, researchers, disability advocates, consumers, services providers, employers, congressional staff and government officials in a dialogue about the impact of policies and programs on the employment of people with disabilities and innovative approaches to reforming and overcoming some of the existing barriers." *See* "Employment Post the Americans with Disabilities Act Conference Summary," USCCR/OCRE files, p. 1. The conference followed up on a conference held the previous year on the topic of "Employment and Return to Work for People with Disabilities." Another conference was planned for the following year. Ibid., pp. 1–2.

[198] *See* Andrew Imparato, General Counsel and Director of Policy, National Council on Disability, presentation at 1997 Post-ADA Conference, p. 6. Mr. Imparato gave as the thesis of his talk that civil rights laws are in conflict with disability polices. He added that the reality of Federal policy in prac-

The SSI/SSDI programs are based on a dependency, charity model of disability, whereas section 504 and the ADA promote independence and working. A member of the National Council on Disability noted the conflicting assumptions of disability benefits programs and the ADA:

- dependence versus productivity—disability programs are based on the dependence, charity model.
- integration versus segregation—the Americans with Disabilities Act talks about the most integrated setting, but the Rehabilitation Act sets up a segregated system and even segregates by disability types.
- rights versus responsibilities—it is incumbent upon the disability community to take responsibility, to take advantage of the opportunities open to it.[199]

The Chairman of the President's Committee on Employment of People with Disabilities explained the conflict between the ADA and disability benefits programs as follows. Because private insurers deny coverage for preexisting conditions, individuals with disabilities are dependent on medicare and medicaid for health insurance. However, to receive medicare and medicaid, individuals with disabilities must label themselves as unemployable. In turn, this makes it hard for them to exercise their rights under the Americans with Disabilities Act.[200]

Congressman Jim Bunning said that he perceived two main problems with SSI/SSDI programs. First, it takes too long to get on SSDI, sometimes it takes as long as 1½ years, and some people even die before they receive SSDI benefits. Second, the SSDI program is not conducive to getting people back to work. Representative Bunning added that the passage of the Americans with Disabilities Act showed that Congress recognizes that people with disabilities want to work and will work if the barriers that keep them from working are eliminated. However, he said, this recognition never changed the SSDI program, which remains a "black hole for people with disabilities—less than one percent of SSDI recipients leave the rolls because of work.[201]

Conference participants called for a major overhaul of the Nation's disability policy to reconcile these conflicts and create a Federal disability policy that encourages individuals with disabilities to work, while simultaneously providing them with needed supports, assistance, and assistive technology.[202] For instance, the Chairman of the President's Committee stated that, in contrast to the ADA, many government programs are based on "insulting and patronizing" attitudes about people with disabilities. He said that the Americans with Disabilities Act is just a beginning and argued that although the ADA had provided individuals with disabilities with statutory protections, the Nation still must make full participation and equal opportunity a reality for persons with disabilities. To do this, it is necessary to change attitudes and policies that make persons with disabilities dependent.[203]

In particular, conference participants advocated separating eligibility for federally supported health care from participation in disability benefits programs to offer working people with disabilities the chance to participate in such programs, possibly by paying a portion of their insurance premiums themselves.[204] Congressman Bunning, for example, told conference participants that three main things need to be done: (1) allow persons with disabilities to choose what services they will get and who will provide them; (2) enable as many providers as possible to participate in the return to work program through an innovative payment mechanism; and (3) provide health insurance security.[205]

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tice is that it usually sends the message that people with disabilities cannot and should not work. Ibid.

[199] Bonnie O'Day, member, National Council on Disability, presentation at 1997 Post-ADA Conference, p. 19.

[200] Tony Coelho, Chairman of the President's Committee on Employment of People with Disabilities, presentation at 1997 Post-ADA Conference, p. 3 (hereafter cited as Coelho presentation).

[201] Congressman Jim Bunning (R-KY), presentation at 1997 Post-ADA Conference, p. 28 (hereafter cited as Bunning presentation).

[202] 1997 Post-ADA Conference.

[203] Coelho presentation, p. 3.

[204] Ibid., p. 4. *See also* Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998 (stating: "The unavailability of health insurance should not be a disincentive to work and Medicaid should be available at a sliding scale.").

[205] Bunning presentation, p. 28.

Conference participants also noted that other barriers that prevent people with disabilities from becoming employed, such as inaccessible transportation and the need for personal assistance supports, need to be addressed for individuals with disabilities to have equal employment opportunity.[206]

Conference participants pointed to lack of preparation as another major reason why people with disabilities have been unable to take advantage of the new opportunities provided by the ADA. A conference participant representing employers argued that lack of skills is a major barrier to employment for people with disabilities and the Federal Government needs to assist them in becoming more competitive in the labor market.[207] The Acting Assistant Secretary for Policy for the U.S. Department of Labor told conference participants that there is some evidence that the United States is beginning to experience a worker shortage, which he believed is really a skills shortage. He said that it is becoming increasingly necessary to take steps to provide skills to traditionally excluded groups and the government should pay the same attention to eliminating the barriers and providing skills to individuals with disabilities as it has for individuals on welfare. He added that changes in technology have, for the first time, made it possible for many people with severe disabilities to work.[208] Another speaker noted that one-half of students with disabilities do not graduate from high school and argued that the Federal Government should ensure that they are provided equal educational opportunity and "relevant training for jobs of today and tomorrow."[209] In calling for better job training for people with disabilities, A representative of United Cerebral Palsy Associations said that "[w]ork is where preparation meets opportunity."[210]

Conference participants held out the prospect that reforming the Nation's disability policy not only would benefit people with disabilities, but also would save taxpayers' money, because if people with disabilities were able to work, they would need less public money. The current system costs taxpayers possibly as much as $300 billion a year and is likely to become even more costly.[211]

The National Council on Disability and the National Academy of Social Insurance both have called upon Congress to reform the Nation's disability policy along the lines advocated by the conference participants.[212] For instance, the Disability Policy Panel of the National Academy of Social Insurance, pointing to the excessive cost and complexity of existing policy, which permits persons leaving the SSDI roles to "buy in" to medicare, has recommended "an improved medicare buy-in that is more affordable and understandable for [SSDI] beneficiaries who return to work despite the continuation of their impairments. The Panel recommends a centrally-administered medicare buy-in with a simplified premium structure scaled to earnings."[213] The panel also recommended "a personal assistance tax credit to compensate working people for part of the cost of personal assistance services they need in order to work."[214] The National Council on Disability has called for a host of changes to existing policy to create "a system that serves as a trampoline, rather than a safety net, supporting people as they maximize their potential, catching them when they fall, and supporting their efforts toward independence again, always moving toward the goal of maximal employment."[215] According to the National Council on Disability, "key ingredients" of such a system "include access to health insurance, tax credits to ensure that transitioning from benefits to employment does not produce financial disincentives, flexibility to accommodate disabilities that intermittently limit work capacity, and third parties with a vested interest in assisting people with disabilities in maximizing their employment."[216]

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[206] E.g., Coelho presentation, p. 4. *See also* Ringer letter, attachment, p. 1 (stating: "vocational rehabilitation needs to be demolished and resurrected with new methods and new goals to measure success. Rehabilitation needs some assistance from overall policies related to transportation, affordable accessible housing and personal assistance.").

[207] Ann Elizabeth Reesman, General Counsel, Equal Employment Advisory Council, presentation at 1997 Post-ADA Conference, pp. 8–9.

[208] Seth Harris, Acting Assistant Secretary for Policy, U.S. Department of Labor, presentation at 1997 Post-ADA Conference, p. 3.

[209] Coelho presentation, p. 4.

[210] Tony Young, Policy Associate, United Cerebral Palsy Associations, presentation at 1997 Post-ADA Conference, p. 7.

[211] Coelho presentation, p. 4.

[212] *See* NCD, *Achieving Independence*; National Academy of Social Insurance, *Balancing Security and Opportunity: The Challenge of Disability Income Policy*, Report of the Disability Policy Panel (Washington, DC: National Academy of Social Insurance, 1996) (hereafter cited as National Academy of Social Insurance, *Balancing Security and Opportunity*).

[213] National Academy of Social Insurance, *Balancing Security and Opportunity*, pp. 145–46.

[214] Ibid., p. 147.

The President and Congress have taken steps towards reforming disability policy to remove work disincentives and promote the purposes of the ADA. On March 13, 1998, "to support the goals articulated in the findings and purpose section of the Americans with Disabilities Act of 1990," President William J. Clinton issued an executive order establishing a National Task Force on Employment of People with Disabilities "to create a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population."[217] The Secretary of Labor is the Chair of the task force, and the Vice Chair is the Chair of the President's Committee on Employment of People with Disabilities. The members of the task force include Secretaries of a number of Federal Cabinet-level agencies, the Chairperson of the National Council on Disability, the Chair of the Equal Employment Opportunity Commission, and heads of several other Federal agencies.[218] The task force is charged with issuing four reports between November 15, 1998, and July 26, 2002, to develop and recommend to the President a Federal policy to reduce employment barriers faced by individuals with disabilities. Among the specific charges the Executive order gives the task force are:

> (1) analyze the existing programs and policies of Task Force member agencies to determine what changes, modifications, and innovations may be necessary to remove barriers to work faced by people with disabilities;
>
> (2) develop and recommend options to address health insurance coverage as a barrier to employment for people with disabilities;
>
> (3) subject to the availability of appropriations, analyze State and private disability systems . . . and their effect on Federal programs and employment of people with disabilities.[219]

Congressional action in this area includes introduction in the U.S. House of Representatives of a bipartisan bill sponsored by Reps. Jim Bunning and Barbara Kennelly.[220] If passed, the bill would move in the direction called for by proponents of disability policy reform. Entitled the "Ticket to Work and Self Sufficiency Act of 1998" (H.R. 3433), the bill would extend medicare coverage for people leaving the SSDI rolls and joining the work force for up to an additional 2 years and would provide other supports to persons with disabilities seeking to enter the work force.[221] For instance, the bill provides social security beneficiaries with choice of providers of services that assist them in becoming employed.[222] The bill also would create a demonstration project to test a gradual offset of SSDI benefits by reducing benefits $1 for every $2 in earnings above a minimum amount.[223] Finally, the bill would create an Advisory Panel to be made up of one member each appointed by the Chairman of the House Committee on Ways and Means, the ranking minority member of the Committee on Ways and Means, the Chairman of the Committee on Finance of the Senate, and the ranking minority member of the Senate Committee on Finance, as well as two members appointed by the President. The Advisory Panel would advise the Commissioner of Social Security on implementing the Ticket to Work program, on disabled beneficiaries' access to employment networks, on research and demonstration project designs, and on the development of performance measurements. The Advisory Panel would submit progress reports to the President and members of Congress.[224] A similar bill, The Work Incentives Improvement Act of 1998, was introduced in the U.S. Senate on March 25, 1998, by Sens. James M. Jeffords, Thomas Harkin, and Edward M. Kennedy.[225]

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[215] NCD, *Achieving Independence*, p. 76.

[216] Ibid.

[217] Exec. Order No. 13,078, 63 Fed. Reg. 13,111 (1998).

[218] The full list of members is: the Secretary of Labor; Secretary of Education, Secretary of Veterans Affairs, Secretary of Health and Human Services, Commissioner of Social Security, Secretary of the Treasury, Secretary of Commerce, Secretary of Transportation, Director of the Office of Personnel Management, Administrator of the Small Business Administration, the Chair of the Equal Employment Opportunity Commission, the Chairperson of the National council on Disability, the Chair of the President's Committee on Employment of People with Disabilities, and "such other senior executive branch officials as may be determined by the Chair of the Task Force." Exec. Order No. 13,078, 63 Fed. Reg. 13,111 (1998) at § 1(a).

[219] Exec. Order No. 13,078, 63 Fed. Reg. 13,111 (1998) at §§ 1(c)(1)–(3).

[220] H.R. 3433, 105th Cong. (1998).

[221] *Id.* § 3, 105th Cong. (1998). *See also* "Bunning Announces Hearing on the 'Ticket to Work and Self-Sufficiency Act of 1998'," Advisory from the Committee on Ways and Means, Subcommittee on Social Security, Mar. 10, 1998 (hereafter cited as "Ticket to Work and Self-Sufficiency Act of 1998"). *See also* "Bipartisan Bill Seeks to Help Disabled leave SSDI to Return to Work," *Daily Labor Report* (Mar. 12, 1998), p. A9. The proposed bill has been criticized for merely adding 2 years to the extended medicare coverage rather than adopting a sliding scale "buy-in" program that would allow working people with disabilities to continue in medicare indefinitely, paying their own premiums at prices depending on their earnings. *See* "Ticket to Work and Self-Sufficiency Act of 1998:" *Hearing on H.R. 3433 Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 105th Cong. 3 (Mar. 17, 1998) (statement of the Consortium for Citizens with Disabilities Task Force on Social Security, presented by Tony Young, Public Policy Associate, United Cerebral Palsy Associations, Inc.).

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[222] H.R. 3433, § 2, 105th Cong. (1998).

[223] *Id.*

[224] *Id.*

[225] S. 1858, 105th Cong. (1988).

3 Organization and Administration of the U.S. Equal Employment Opportunity Commission

Mission and Responsibilities

EEOC was created by title VII of the Civil Rights Act of 1964 to enforce title VII, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[1] EEOC's mission is "to promote equal opportunity in employment by enforcing the federal civil rights employment laws through administrative and judicial actions, and education and technical assistance."[2] EEOC carries out its mission through investigation, conciliation, litigation, coordination, regulation, decision, policy research, outreach and education, and technical assistance.[3]

EEOC is responsible for addressing employment discrimination in the Federal and private sectors, including public and private employers of 15 or more employees, public and private employment agencies, and labor organizations with 15 or more members.[4] EEOC, through its field and headquarters offices, receives and investigates discrimination charges and where a violation exists, attempts to secure remedies through conciliation and, if necessary, court action.[5] In addition, the agency provides leadership in coordinating equal employment opportunity programs with other Federal departments and agencies; holds hearings on proposed regulations that affect employees, employers, and labor organizations; and issues decisions on complaints of employment discrimination or where discrimination is an issue.[6]

EEOC's responsibilities have changed since its inception in July 1965. EEOC's original jurisdiction was title VII enforcement for almost all nongovernment employers of 25 or more employees and unions, employment agencies, and sponsors of apprenticeships or other job training programs.[7] EEOC could hire staff, establish regional offices, subpoena records, and develop rules and regulations for carrying out its mandate.[8] Its primary functions included regulation, complaint (or charge) investigation, and conciliation. EEOC could intervene in litigation as a "friend of the court."[9] It could *not* enforce decisions without assistance from the U.S. Department of Justice or the private bar and was limited to seeking compliance with title VII through "persuasion and negotiation" between the complainant and the respondent.[10]

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[1] *See* Pub. L. No. 88–352, § 705, 78 Stat. 241, 258 (1964) (codified as amended at 42 U.S.C. § 2000e–4 (1994)).

[2] U.S. Equal Employment Opportunity Commission (EEOC), "Strategic Plan: 1997–2002," OMB Review Copy, Aug. 18, 1997 (hereafter cited as EEOC, "Strategic Plan").

[3] EEOC, "Organization, Mission, and Functions," p. I–1; EEOC, *Fiscal Year 1994 Annual Report*, p. 7 (hereafter cited as EEOC, *FY 1994 Annual Report*).

[4] *See* 42 U.S.C. §§ 2000e–5(a) (1994). *See also* U.S. Equal Employment Opportunity Commission, "Directives Transmittal: Organization, Mission, and Functions," (EEOC Notice 110.002), May 11, 1997, p. 1–1 (hereafter cited as EEOC, "Organization, Mission and Functions").

[5] EEOC, "Organization, Mission, and Functions," pp. I–1, II–1.

[6] Ibid., p. II–1.

[7] Civil Rights Act of 1964, Pub. L. No. 88–352, §§ 701, 703, 78 Stat. 241, 253, 255–59 (codified as amended at 42 U.S.C. § 2000e(b), 2000e–2 (1994)). *See also* U.S. Commission on Civil Rights (USCCR), *Federal Enforcement of Equal Employment Requirements* (Washington, DC: U.S. Government Printing Office, July 1987), p. 10 (hereafter cited as USCCR, *Federal Enforcement of Equal Employment Requirements*).

[8] Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241, 258, 264–65 (codified as amended at 42 U.S.C. §§ 2000e–4, 2000e–9, 2000e–12 (1994)). *See also* USCCR, *Federal Enforcement of Equal Employment Requirements*, p. 10.

In 1972 Congress amended title VII and gave EEOC new enforcement authority and expanded jurisdiction. EEOC's new authority included the power to file lawsuits against private employers, employment agencies, and unions when conciliation efforts failed, and authority (which shifted from the Department of Justice) to file systemic ("pattern and practice") suits against private employers.[11] The 1972 amendments also extended EEOC's jurisdiction to all educational institutions and State and local governments and broadened title VII coverage to include employers of 15 or more employees and unions with 15 more members.[12]

President Jimmy Carter's Reorganization Plan of 1978[13] established EEOC as the lead agency for coordinating all Federal equal employment policies and procedures.[14] In addition, EEOC received enforcement responsibility for the Age Discrimination in Employment Act (ADEA)[15] and the Equal Pay Act (EPA).[16] The reorganization also transferred to EEOC responsibility for enforcing equal employment opportunity requirements in the Federal sector under section 501 of the Rehabilitation Act of 1973[17] and section 717 of title VII, which prohibits discrimination by Federal agencies on the basis of race, color, sex, religion, or national origin.[18] The 1978 Pregnancy Discrimination Act amended title VII to provide that employment discrimination because of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination.[19]

In 1992 EEOC began to enforce title I of the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991.[20] With the addition of the ADA, EEOC's jurisdiction expanded to include protection of employees and applicants from employment discrimination in the workplace based on race, color, religion, sex, national origin, *and* disability. In addition to processing ADA complaints, the EEOC develops regulations, and, in consultation with the Attorney General, develops and implements a technical assistance plan to assist entities covered under the act.[21] The Department of Justice has litigation authority for charges against State and local governments under title VII and the ADA.[22]

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[9] USCCR, *Federal Enforcement of Equal Employment Requirements*, p. 10.

[10] Ibid.

[11] Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103, 104–07 (codified as amended at 42 U.S.C. §§ 2000e–5(f)(1), 2000e–6(a) and (c) (1994)). *See also* USCCR, *Federal Enforcement of Equal Employment Requirements*, p. 10.

[12] Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e(b), 2000e(e) (1994)). *See also* USCCR, *Federal Enforcement of Equal Employment Requirements*, p. 10.

[13] *Reprinted in* 42 U.S.C. § 2000e–4 app. (1994).

[14] Exec. Order No. 12,067, 3 C.F.R. 206 (1978), *reprinted in* 42 U.S.C. § 2000e app. (1994).

[15] 29 U.S.C. §§ 621–634 (1994).

[16] 29 U.S.C. § 206(d) (1994). Responsibility for these two laws transferred from the Wage and Hour Division of the Department of Labor. *See* USCCR, *Federal Enforcement of Equal Employment Requirements*, p. 11.

[17] 29 U.S.C. § 791(b) (1994).

[18] The section also requires Federal agencies to maintain equal opportunity programs and gives EEOC overall responsibility for Federal procedures used in processing internal discrimination complaints. 42 U.S.C. § 2000e–16 (1994). *See also* USCCR, *Federal Enforcement of Equal Employment Requirements*, p. 11.

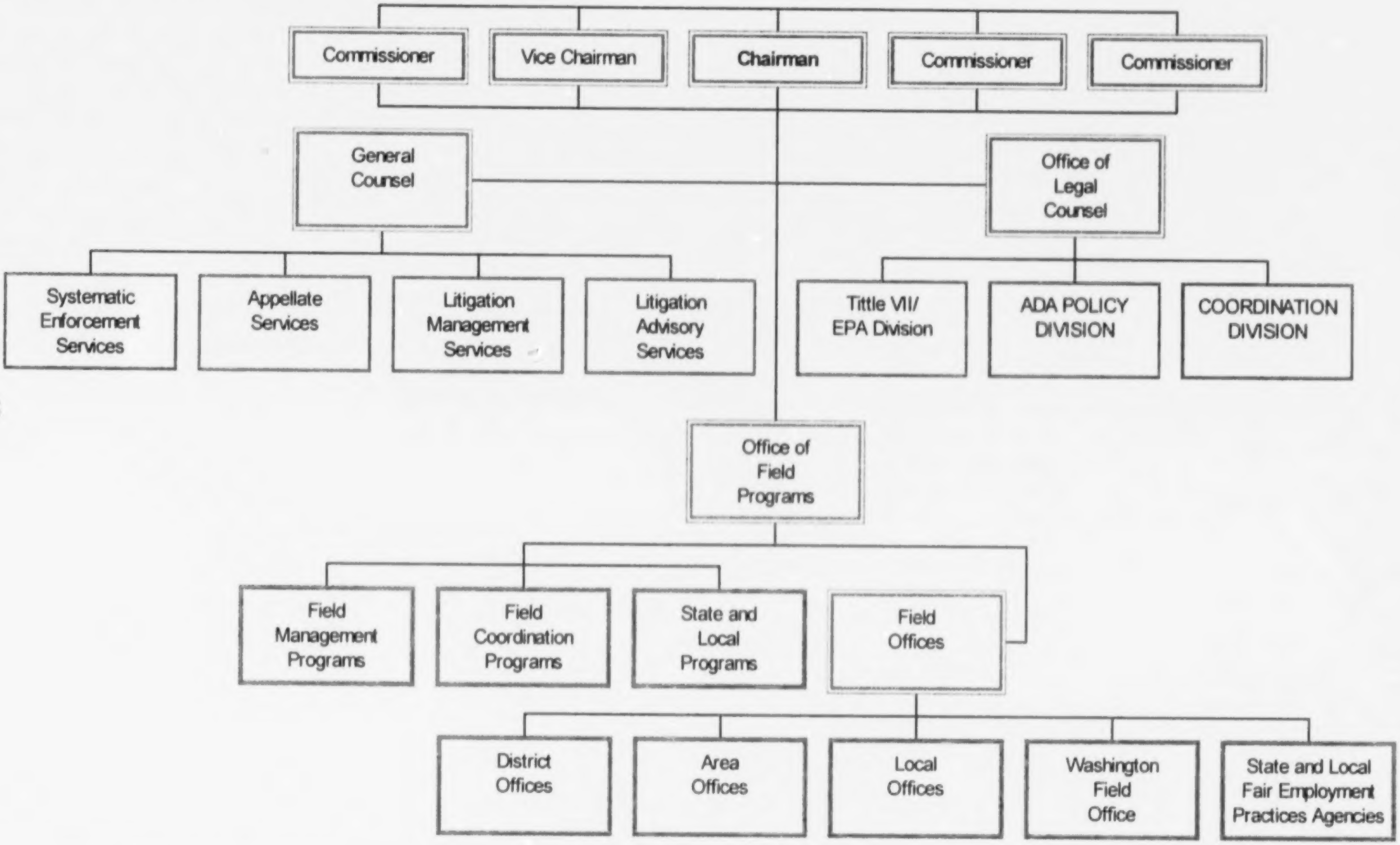
[19] *See* 42 U.S.C § 2000e(k) (1994).

[20] EEOC, "Organization, Mission, and Functions," pp. I–2–3; EEOC, *FY 1993 Annual Report*, p. v.; EEOC, *FY 1994 Annual Report*, p. 2.

[21] EEOC, "Organization, Mission and Functions," pp. I–2–3.

[22] *See* 42 U.S.C. §§ 2000e–5(f), 12134 (a) (1994); U.S. General Accounting Office, *EEOC's Expanding Workload: Increases in Age Discrimination and Other Charges Call for a New Approach* (Report to the Chairman, Special Committee on Aging, U.S. Senate, February 1994), p. 6 (hereafter cited as GAO, *EEOC's Expanding Workload*).

FIGURE 3.1
The Equal Employment Opportunity Commission



Commissioner
Vice Chairman
Chairman
Commissioner
Commissioner
General Counsel
Office of Legal Counsel
Systematic Enforcement Services
Appellate Services
Litigation Management Services
Litigation Advisory Services
Tittle VII/ EPA Division
ADA POLICY DIVISION
COORDINATION DIVISION
Office of Field Programs
Field Management Programs
Field Coordination Programs
State and Local Programs
Field Offices
District Offices
Area Offices
Local Offices
Washington Field Office
State and Local Fair Employment Practices Agencies

Source: EEOC, "Organization, Mission and Functions," p. I–7.

Structure

EEOC and other commentators have argued that EEOC's responsibilities have expanded at a greater pace than its resources.[23] Further, as its enforcement duties increased with the passing of the ADA and the Civil Rights Act of 1991, staff and resources began to shrink. EEOC alleges that it does not have sufficient resources to accomplish its mission.[24] However, although task forces established by Former Chairman Casellas to analyze various issues[25] have alluded to staffing and resources as barriers to EEOC fulfilling its mission, a formal review of the organizational structure of EEOC and staff allocation has not been done.[26]

Five Commissioners are responsible for the administration of the EEOC. They are appointed by the President and confirmed by the U.S. Senate. Commissioners are appointed for 5-year staggered terms. The Commissioners develop and approve the policies of the EEOC, participate equally on all matters, decide questions by majority vote, issue Commissioners' charges of discrimination where appropriate, authorize and approve the filing of suits, and perform any other functions related to issues that come before EEOC.[27]

The President designates a Chairman and a Vice Chairman. The Chairman is responsible for the implementation of EEOC policy and has the authority to appoint attorneys and other personnel and agents to assist the EEOC in the achievement of its policy, mission, and functions. The Chairman recommends policies, procedures, and programs to the agency and carries out other functions, including financial management and organizational development of the EEOC. The Vice Chairman serves as Acting Chairman in the absence of the Chairman.[28] According to several EEOC officials, all final major decisions on budget, staffing, policy statements, organizational structure, and so on are made by the Commissioners.[29]

EEOC was reorganized in May 1997[30] as "part of the Commission's continuing efforts to reinvent and improve the effectiveness of the agency."[31] EEOC consists of 11 offices at headquarters and 50 field offices (district, area, and local offices) nationwide.[32] The headquarters offices most involved in EEOC's ADA enforcement are the Office of General Counsel, the Office of Legal Counsel, and the Office of Field Programs. The other headquarters offices are: Executive Secretariat; Office of Equal Opportunity; Office of Communications and Legislative Affairs; Office of Federal Operations; Office of Human Resources; Office of Research, Information, and Planning; Office of In-

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[23] *See* Paul M. Igasaki, Acting Chairman, EEOC, interview in Washington, DC, Apr. 7, 1998, p. 2 (hereafter cited as Igasaki interview); Paul Steven Miller, Commissioner, EEOC, interview in Washington, DC, Apr. 2, 1998, (hereafter cited as Miller interview); *Hearings Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. 5 (Mar. 13, 1998), p. 3 (statement of David A. Cathcart, partner, Gibson, Dunn & Crutcher) (hereafter cited as Cathcart testimony).

[24] The Strategic Plan cautions that EEOC's growing workload, in part due to the Americans with Disabilities Act, also could impede its ability to achieve its goals and asserts that EEOC "received no new resources for ADA enforcement." EEOC, "Strategic Plan," p. 42.

[25] *See* EEOC, "EEOC's State and Local Program Relationship with Fair Employment Practice Agencies: EEOC/FEPA Task Force Report to Chairman Gilbert F. Casellas," Mar. 15, 1996 (hereafter cited as EEOC, "FEPA Task Force Report"); EEOC, "Charge Processing Task Force Report," December 1994-March 1995, (hereafter cited as EEOC, "Charge Processing Task Force Report"); U.S. Equal Employment Commission, "Task Force on Alternative Dispute Resolution: Report to Chairman Gilbert F. Casellas," March 1995 (hereafter cited as EEOC, "ADR Task Force Report").

[26] Igasaki interview; Miller interview, p. 3.

[27] EEOC, "Organization, Mission, and Functions," p. II–1.

[28] Ibid.

[29] *See* Ellen Vargyas, Legal Counsel, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 8, 1998, p. 1 (hereafter cited as Vargyas interview); Christopher Kuczynski, Director, Americans with Disabilities Act Division, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 7, 1998, pp. 2–3 (hereafter cited as Kuczynski interview); Godfrey Dudley, Keziah Walker, and Ralph Soto, Field Management Programs, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 7, 1998, p. 3 (hereafter cited as Dudley interview); Peggy R. Mastroianni, Associate Legal Counsel, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 6, 1998, pp. 1, 10 (hereafter cited as Mastroianni interview).

[30] *See* EEOC, "Organization, Mission, and Functions."

[31] Claire Gonzales, Director of Communications and Legislative Affairs, letter to Judd Gregg, Chairman, Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, Committee on Appropriations, U.S. Senate, Apr. 18, 1997.

[32] EEOC, *FY 1994 Annual Report*, p. 7; EEOC, Office of Program Operations, *FY 1995 Annual Report* (hereafter cited as EEOC, *FY 1995 Annual Report*).

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formation Resources Management; and Office of Financial Resource Management.[33]

Office of General Counsel

EEOC's General Counsel is appointed by the President and confirmed by the U.S. Senate. The term of the General Counsel is 4 years.[34] The Office of General Counsel is responsible for all enforcement litigation on behalf of the EEOC.[35] The General Counsel is delegated the authority to make decisions to "commence or intervene" in all litigation, except in cases where such litigation would involve "a major expenditure of resources; cases where the EEOC has not yet adopted a position in developing areas of law; cases that would likely raise public controversy; and *amicus curiae* cases, which need to be approved by the Commissioners. The General Counsel also is delegated the authority to refer public sector title VII and ADA cases that cannot be conciliated to the Department of Justice. The General Counsel may redelegate this authority to the regional attorneys operating in EEOC's field offices.[36]

The Office of General Counsel has four major units:[37]

- ***Systemic Enforcement Services*** investigates and litigates systemic cases and Commissioner charges. Its mission is to litigate cases that (1) involve systemic patterns or practices applying to large numbers of persons, and generally requiring expert testimony as part of EEOC's proof in the cases, and (2) raise novel legal questions and would lead to clarification of the law or development of authority for important issues. The latter cases do not necessarily apply to classes of people, but would have an effect on large numbers of people by virtue of clarifying or developing the law.[38]
- ***Appellate Services*** represents EEOC in appeals of its own cases and as *amicus curiae* in private cases.[39]
- ***Litigation Management Services*** oversees EEOC's litigation in trial courts (with the exception of headquarters systemic litigation). This unit is responsible for overseeing the litigation work in the field and supporting and coordinating the work of the legal units in the district offices. The Litigation Management Services unit produces brief banks, collects jury instructions, and prepares model pleadings for use by the field offices. In addition, the unit prepares memoranda on particular substantive and procedural matters (such as attorney-client privilege and compensatory damages) and has prepared instructional manuals on discovery and preparing witnesses for deposition.[40]
- ***Litigation Advisory Services*** reviews and recommends approval or disapproval of litigation proposals for the General Counsel's consideration.[41]

The units of the Office of General Counsel coordinate with other EEOC offices in a variety of ways. For example, an Assistant General Counsel for Litigation Management Services stated that his unit interacts frequently with the Research and Analytic Services staff in the Office of General Counsel, which is a group of social scientists who provide expertise for complex cases, such as on issues related to labor economics and testing. The Litigation Management Services unit also interacts with the Office of Legal Counsel on issues of personnel law and ethics.[42] Similarly, the Systemic Litigation Services unit frequently works with staff in Appellate Services and the Office of Legal Counsel.[43]

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[33] EEOC, "Organization, Mission, and Functions," p. I–7.

[34] Ibid., pp. I–1, III–5.

[35] Ibid., p. III–3.

[36] EEOC, "National Enforcement Plan," February 1996, p. 8.

[37] The 1997 reorganization of EEOC moved Systemic Investigations and Review Programs to the Office of General Counsel from the Office of Program Operations (renamed, under the reorganization, Office of Field Programs). The 1997 Directives Transmittal on EEOC's reorganization indicated, however, that the Office of General Counsel was undergoing an "extensive review" and might undergo further reorganization. EEOC, "Organization, Mission, and Functions," pp. III–12—III–13. According to an assistant general counsel, the Systemic Litigation Services unit and the Systemic Investigations and Review Programs unit were merged into a single unit, Systemic Enforcement Services. Gerald Letwin, Assistant General Counsel, System Enforcement Services, Office of General Counsel, EEOC, interview in Washington, DC, Apr. 6, 1998, p. 1 (hereafter cited as Letwin interview).

[38] Letwin interview, pp. 1–2. *See also* Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), USCCR, July 9, 1998, Comments of the U.S. Equal Employment Opportunity Commission, pp. 2–3 (hereafter cited as EEOC Comments).

[39] Vincent Blackwood, Assistant General Counsel, Appellate Services, Office of General Counsel, EEOC, interview in Washington, DC, Apr. 2, 1998, p. 1 (hereafter cited as Blackwood interview). *See also* EEOC Comments, p. 3.

[40] Jerome Scanlan, Assistant General Counsel, Litigation Management Services, Office of General Counsel, EEOC, interview in Washington, DC, Apr. 6, 1998, pp. 1–3 (hereafter cited as Scanlan interview). *See also* EEOC Comments, p. 3.

[41] EEOC, "Organization, Mission, and Functions," pp. III–7—III–13. *See also* EEOC Comments, p. 3.

In their joint report published in March 1998, the Priority Charge Handling Task Force and the Litigation Task Force recommended that the systemic unit develop a Systemic Enforcement Plan to explain how the unit plans to supplement the systemic work done by the field offices. According to the report, the plan should set goals for expected results and the unit should be responsible for achieving such results.[44]

Office of Legal Counsel

The Office of Legal Counsel[45] provides legal advice and counsel to the Chairman and to the agency. In addition, the office prepares decisions, regulations, guidance, and legal policy implementing EEOC's covered statutes and represents the Commission in litigation when it is a defendant, except in matters arising out of enforcement litigation.[46] For example, when Congress passed the ADA in 1990, the Office of Legal Counsel reviewed the legislation and drafted Commission recommendations for changes, as well as developed work plans to implement the regulations and a technical assistance program to inform those covered and protected by the ADA. The Office of Legal Counsel provided initial training on the ADA to EEOC staff and prepared policy guidance documents on the ADA for field staff and the public.[47]

The 1997 reorganization of EEOC realigned the Office of Legal Counsel so all staff in the litigation divisions reports to the Deputy Legal Counsel, while the Coordination and Guidance divisions report to the Associate Legal Counsel. The Office of Legal Counsel consists of the Legal Counsel, Deputy Legal Counsel and Legal Services Programs, and Associate Legal Counsel and Coordination and Guidance Programs.[48] Coordination and Guidance Programs has three divisions:

- ***ADA Policy Division***, which develops and interprets EEOC policy guidance with respect to the ADA and sections 501 and 504 of the Rehabilitation Act of 1973. Other responsibilities include: preparing opinion letters, drafting Commission decisions, and providing technical assistance.[49] ADA Policy Division staff is involved in training and technical assistance for a variety of groups including EEOC headquarters staff, field offices, and other organizations.[50]
- ***Title VII/ADEA/EPA Division***, which develops and interprets EEOC policy for title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA).[51] Previously, there had been two separate divisions that covered title VII/EPA and the ADEA.[52]
- ***Coordination Division***, which provides staff support under Executive Order 12067,[53] which designated EEOC as the lead equal employment opportunity agency and requires it to coordinate overlapping equal employment opportunity responsibilities among Federal agencies.[54]

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[42] Scanlan interview, p. 5.

[43] Letwin interview, pp. 3–4.

[44] EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report* (March 1998), p. 32 (hereafter cited as EEOC, *March 1998 Task Force Report*).

[45] The primary difference between the Office of Legal Counsel and the Office of General Counsel is that the Office of General Counsel conducts litigation while the Office of Legal Counsel provides legal advice and counsel and develops regulations and other statements implementing the various statutes. EEOC, "Organization, Mission, and Functions," p. V–3.

[46] EEOC, "Organization, Mission, and Functions," p. V–3.

[47] EEOC, *Fiscal Year 1990 Annual Report*, p. 8 (hereafter cited as EEOC, *FY 1990 Annual Report*).

[48] EEOC, "Organization, Mission, and Functions," p. V–1. *See also* EEOC Comments, pp. 3–4.

[49] EEOC, "Organization, Mission, and Functions," p. V–8.

[50] Kuczynski interview.

[51] EEOC, "Organization, Mission, and Functions," p. V–7.

[52] Kuczynski interview, p.3.

[53] *Reprinted in* 42 U.S.C. § 2000e app. (1994).

[54] EEOC, "Organization, Mission, and Functions," p. V–7. *See* Carol Miaskoff, Assistant Legal Counsel, Coordination Division, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 7, 1998, p. 1 (hereafter cited as Miaskoff interview).

TABLE 3.1
EEOC District, Area, and Local Offices

District office		Area office(s)		Local office(s)	
Location	*No. of staff*	*Location*	*No. of staff*	*Location*	*No. of staff*
Albuquerque, NM	28				
Atlanta, GA	88	Savannah, GA	7		
Baltimore, MD	69	Norfolk, VA	16		
		Richmond, VA	24		
Birmingham, AL	67	Jackson, MS	28		
Charlotte, NC	61	Raleigh, NC	17	Greensboro, NC	7
				Greenville, SC	6
Chicago, IL	83				
Cleveland, OH	62	Cincinnati, OH	20		
Dallas, TX	76	Oklahoma City, OK	19		
Denver, CO	59				
Detroit, MI	56				
Houston, TX	73				
Indianapolis, IN	61	Louisville, KY	15		
Los Angeles, CA	67	San Diego, CA	18		
Memphis, TN	61	Little Rock, AR	18		
		Nashville, TN	20		
Miami, FL	83	Tampa, FL	28		
Milwaukee, WI	49	Minneapolis, MN	17		
New Orleans, LA	70				
New York, NY	74	Boston, MA	17	Buffalo, NY	9
Philadelphia, PA	73	Newark, NJ	16		
		Pittsburgh, PA	27		
Phoenix, AZ	61				
San Antonio, TX	58	El Paso, TX	19		
San Francisco, CA	53	Fresno, CA	5		
		Oakland, CA	6		
		San Jose, CA	8		
		Honolulu, HI	5		
Seattle, WA	54				
St. Louis, MO	59	Kansas City, MO	25		
Washington, DC	43				
Total	1,588		375		22

Note: Data as of Feb. 25, 1998.
Source: Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick Isler, Assistant Staff Director, OCRE, USCCR, Mar. 6, 1998, attachment item B-6-8.

Most of the work done by this unit is providing general advice on policy. Agencies consult EEOC when issuing policies that have an impact on equal employment opportunity.[55]

Office of Field Programs

The Office of Field Programs (OFP) is responsible for administrative enforcement of the statutes under EEOC's jurisdiction.[56] According to the Director of the Office of Field Programs, OFP is a "service organization." Its responsibility is to provide guidance to the field offices.[57] The office monitors field offices and provides information on how they can improve their operations and share information with each other.[58] OFP also provides technical assistance and education for the field, headquarters, and the public on EEOC's administrative enforcement process and the laws. It develops operational plans and budgets for the charge resolution process for title VII, the EPA, the ADEA, and the ADA.[59]

OFP consists of three units:[60]

- ***Field Management Programs***, which oversees, coordinates, monitors, and evaluates EEOC's field offices. Field Management Programs staff members do site visits to field offices to provide technical assistance. In fiscal year 1997, they visited approximately 16 offices. Visits are more informal now than in the past. For example, with the new charge processing system they look at how an office is processing its cases. If the processing appears to be inconsistent with the guidance that has been provided to the offices, Field Management Programs staff will explain the guidelines and make recommendations concerning how the office might adjust its case processing operations to better conform with agency procedures.[61]
- ***Field Coordination Programs***, which is responsible for EEOC's alternative dispute resolution (ADR) program, the outreach program, including the revolving fund, and other field-related special emphasis programs.[62] According to the Director of the Field Coordination Program unit, the revolving fund is a self-sustaining training fund that was created several years ago to provide technical assistance to employers and others. Under the revolving fund, technical assistance program seminars (TAPS) are conducted, and special customer specific training is delivered in response to the needs of organizations requesting assistance, for a fee.[63] The unit also is responsible for coordinating field office ADR programs. Cases that appear to be appropriate for ADR are referred to the ADR unit for handling before the investigation process begins.[64]
- ***State and Local Programs***, which monitors the State fair employment practices agencies (FEPAs) and tribal employment rights organizations.[65] This office recommends policy development, oversees the State and local account, and manages the dual-filed caseload on a national basis.

According to the Director of the State and Local Programs unit, analysts are assigned to coordinate with the district offices to monitor FEPA activities. Approximately 90 FEPAs have contracts with EEOC for the resolution of charges under statutes that EEOC enforces.[66]

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[55] Miaskoff interview, p. 1.

[56] EEOC, "Organization, Mission, and Functions," p. VI–3.

[57] Elizabeth Thornton, Director, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 1, 1998, p. 5 (hereafter referred to as Thornton interview).

[58] Thornton, interview, p. 1.

[59] EEOC, "Organization, Mission and Functions," p. VI–4—VI–5.

[60] EEOC's 1997 reorganization revised the Office of Field Programs extensively. In addition to changing the office's name from Office of Program Operations to Office of Field Programs, the reorganization consolidated two Field Management Programs (East and West) into the Field Management Programs Unit. The reorganization eliminated Charge Resolution Review Programs unit and created the State and Local Programs and Field Coordination Programs units. EEOC, "Organization, Mission, and Functions," p. 2.

[61] Dudley interview, p. 1.

[62] *See* chap. 5 for a discussion of EEOC's alternative dispute resolution program and chap. 7 for a discussion of the revolving fund.

[63] Paula Choate, Director, Field Coordination Programs, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 1, 1998 (hereafter cited as Choate interview).

[64] Ibid., p. 2.

[65] See pp. 48–51 below for a discussion of the State fair employment practices agencies.

[66] Michael Dougherty, Director, State and Local Programs, Office of Field Programs, EEOC, interview in Washington,

Field Offices

The field offices report to the Director of the Office of Field Programs.[67] EEOC employs 1,985 staff persons in 50 field offices, which include 24 district offices, the Washington, DC field office, and 25 area and local offices.[68] District offices are under the direct supervision of the Director of the Office of Field Programs. Area and local offices in a district are under the direct supervision of a district director.[69] All district offices are responsible for charge intake, investigation, conciliation, litigation, and the ADR function.[70] In addition district offices have the Federal sector hearings program and outreach and revolving fund activities for both private and Federal sectors.[71]

Field offices have reported varying levels of interaction with EEOC headquarters staff. The extent of interaction with headquarters is related to the role of field staff and the office in which they work. For example, a regional attorney stated that she always receives timely advice from the Office of Legal Counsel, but she was unaware of the steps the Office of Field Programs has taken to assist field offices in the implementation of changes recommended by the task forces.[72] A trial attorney in the same office described less frequent interaction, stating that he has called headquarters approximately three times and has been called a few times by headquarters staff.[73] Investigators have noted that they have little interaction with headquarters staff.[74] Alternatively, the director of the Charlotte District Office stated that headquarters staff has been extremely helpful and responsive.[75]

In April 1998, Acting Chairman Paul M. Igasaki directed the Office of Human Resources, the Office of Research, Information, and Planning, the Office of Financial and Resource Management, and the Office of Information Resources Management to develop "Field Support Plans designed to enhance service responsiveness and accountability to the field."[76] The Acting Chairman also recommended that the Office of General Counsel and the Office of Field Programs jointly develop a work plan to provide enhanced support to field offices in the implementation of the Local Enforcement Plans.[77]

District Offices

The district offices are responsible for EEOC's enforcement functions through determination and litigation, as necessary, of all charges filed under title VII, the ADEA, the EPA, and the ADA. The district offices resolve discrimination cases using various case processing systems, seek remedies for employment discrimination through litigation within the Federal court system, and eliminate employment discrimination through investigation and settlements.[78] District offices are headed by district directors who supervise all staff in the district offices except those in the legal division, who report to regional attorneys (who in turn report to the General Counsel).

In addition to the Office of the Director, most district offices have an Enforcement Management Group consisting of a Charge Receipt/Technical Information Unit, an Enforce-

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DC, Apr. 2, 1998, p. 1 (hereafter cited as Dougherty interview).

[67] EEOC, "Organization, Mission, and Functions," pp. VI-3—VI-15.

[68] EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. ii. *See* table 3.1 for a list of district, area, and local offices and the number of staff employed in each office.

[69] EEOC, "Mission and Functions," p. VI-15.

[70] These functions are assessed in chap. 5.

[71] Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, July 17, 1998, Comments of the U.S. Equal Employment Opportunity Commission, p. 2 (hereafter cited as EEOC Comments, July 17, 1998).

[72] Pamela Thomason, Regional Attorney, Los Angeles District Office, EEOC, telephone interview, Apr. 14, 1998, p. 2 (hereafter cited as Thomason interview).

[73] Peter Laura, Trial Attorney, Los Angeles District Office, EEOC, telephone interview, Apr. 8, 1998, p. 3 (hereafter cited as Laura interview).

[74] *See* Cheryl Mabry-Thomas, Investigator, Chicago District Office, EEOC, telephone interview, Apr. 14, 1998, p. 2 (hereafter cited as Mabry-Thomas interview); Devika Dubey, Investigator, Boston Area Office, EEOC, telephone interview, Apr. 10, 1998, p. 2 (hereafter cited as Dubey interview).

[75] Marsha Drane, District Director, Charlotte District Office, EEOC, telephone interview, Apr. 13, 1998, p. 2 (hereafter cited as Drane interview).

[76] Paul Igasaki, Acting Chairman, EEOC, operational recommendations presented at Apr. 21, 1998 EEOC Commission meeting.

[77] Ibid.

[78] EEOC, "Organization, Mission and Functions," p. XV-3.

ment Unit, and a Systemic Unit and a Legal Division (headed by the regional attorney).

- ***Charge Receipt/Technical Information Units*** serve various functions, including providing administrative and technical support to the enforcement units, assisting in substantial weight reviews,[79] and communicating with charging parties and respondents about the status of charges.[80]
- ***Enforcement Units*** do counseling and precharge interviewing and receive charges under title VII, ADEA, EPA, and the ADA; investigate charges; and collect and analyze information to resolve charges.[81]
- ***Systemic Units*** recommend pattern and practice investigations, investigate employment systems, identify and attempt to resolve instances of discriminatory practices, and review compliance with negotiated settlement and conciliation agreements.[82]
- ***Legal Divisions***, supervised by the regional attorney under the direction of the Office of General Counsel,[83] provide legal advice to and consult with enforcement staff during the complaints process. They also review cases for which conciliation failed and recommend to the General Counsel those cases that may be considered for litigation in Federal court. They litigate title VII, EPA, ADEA, and ADA cases under the supervision of the General Counsel.[84]

Each district office has a program analyst in the Office of the Director who is responsible for coordinating and implementing the office's outreach and revolving fund activities and internal training of staff.[85]

Area Offices

The area offices are under the direction of the district office. An area director provides overall direction, coordination, and leadership support to the office.[86] The area offices resolve discrimination cases[87] and provide administrative and technical support to the enforcement units for notices, counseling, and precharge interviewing. They also investigate charges of discrimination filed under title VII, EPA, ADEA, and ADA.[88] Each area office has a Charge Receipt/Technical Information Unit and an Enforcement Unit(s) with functions similar to those in district offices. However, the area offices do not have Systemic Units or Legal Divisions. The area offices also monitor compliance, in consultation with the Legal Divisions, and make appropriate recommendations for enforcement action.[89]

Local Offices

The local offices also are under the direction of the district offices. Local offices do counseling and precharge interviewing, frame written charges of discrimination, investigate, and obtain settlements for complaints filed under title VII, EPA, ADEA, and ADA. The local offices collect and analyze information to recommend the disposition of charges and provide other EEOC offices with sufficient information to render informed cause or no cause determinations. The local offices collect the information on charges primarily through investigation, review of compliance reports, and monitoring.[90]

Washington Field Office

The Washington Field Office (in Washington, D.C.) is under the direction of the Office of Field Programs. Its responsibilities include investigation, determination, and appropriate resolution of discrimination cases, and securing relief through implementation of various case processing systems. It also provides administrative and technical support to the enforcement units handling inquiries and potential charges or complaints of discrimination under title VII, EPA, ADEA, and ADA.[91]

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[79] See p. 17 below for a discussion of Substantial Weight Reviews.

[80] EEOC, "Organization, Mission and Functions," p. XV–6.

[81] Ibid., pp. XV–6—XV–8.

[82] Ibid., p. XV–8.

[83] Ibid., p. XV–4.

[84] Ibid., pp. XV–8—XV–9.

[85] EEOC Comments, July 17, 1998, p. 2.

[86] EEOC, "Organization, Mission, and Functions," p. XV–16.

[87] Ibid., p. XV–11.

[88] Ibid., p. XV–12.

[89] Ibid.

[90] Ibid., pp. XV–15—XV–16.

[91] Ibid., pp. XV–10—XV–20.

State and Local Fair Employment Practices Agencies

District offices oversee from one to nine State and local fair employment practices agencies (FEPAs). There are approximately 90 FEPAs with which EEOC contracts for resolution of charges under the statutes EEOC enforces.[92] EEOC's "partnership" with certified FEPAs in processing employment discrimination charges has its statutory basis in title VII of the Civil Rights Act of 1964.[93] FEPAs are any certified State or local authority with which the EEOC can dual-file title VII, ADEA, and ADA charges.[94] The use of FEPAs in handling employment discrimination cases under the direction of the EEOC is found in EEOC's procedural regulations.[95]

State and local FEPAs receive payment to investigate and resolve employment discrimination charges. Generally, FEPAs are State and local agencies that enforce State antidiscrimination ordinances that cover a broad range of civil rights and human rights laws.[96] States with laws that are similar in enforcement and intent to the civil rights laws enforced by EEOC contract with EEOC for the resolution of charges that can be dual-filed under the State law and the Federal law.[97] Many FEPAs were in existence for over 20 years before the establishment of the EEOC. In fact, at its creation, EEOC was seen by some legislators and researchers to be the national or Federal counterpart to these agencies.[98]

According to the Director of State and Local Programs, each field office has a State and local coordinator who has contact with the FEPAs. Program analysts in the Office of Field Programs, State and Local Programs Division, work with the State and local coordinators. Occasionally, FEPA staff may work directly with the program analysts at headquarters, or a FEPA director may interact directly with the Director of State and Local Programs. EEOC headquarters staff does not conduct onsite visits of FEPAs, primarily because of a lack of resources.[99]

EEOC does not dictate the method of investigation FEPAs use to handle dual-filed charges. EEOC provides assistance, as needed, but does not get involved in the investigation process. Dual-filed cases are not prioritized as category A, B, or C. Each FEPA has its own intake and categorization methods.[100] FEPAs investigate only those complaints that are filed directly with them. FEPAs do not usually investigate cases that are first filed with EEOC.[101]

Congress earmarks funds in EEOC's annual appropriation budget specifically for the State and local program.[102] In fiscal year 1995, the State and local program received an appropriation of $26.5 million. Of the total, approximately $24 million was used to contract with 89 FEPAs to complete a total of 48,486 "dual-filed" (filed with both EEOC and the FEPA) cases.[103] For FEPAs to receive payment for their assistance, there has to be a "contract" between EEOC and the FEPAs.[104] These "contracting principles" are in a document that sets forth eligibility criteria that a State or local agency must meet for continuing yearly contracts.[105] The contracting principles between EEOC and FEPAs are approved by the Commission each year and are amended to reflect changing priorities in case processing.[106]

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[92] Dougherty interview.

[93] 42 U.S.C. § 2000e–5 (1994).

[94] EEOC, "FEPA Task Force Report," pp. I–1, XVII; 42 U.S.C. § 20002–5(c) (1994).

[95] 29 C.F.R. §§ 1601.70–1601.80 (1997).

[96] *See* USCCR, *Federal Civil Rights Enforcement Effort, 1971*, p. 85.

[97] Dougherty interview, p. 2.

[98] *See* USCCR, *Federal Civil Rights Enforcement Effort* (Washington, DC: U.S. Government Printing Office, 1971), p. 85 (hereafter cited as USCCR, *Federal Civil Rights Enforcement Effort, 1971*).

[99] Dougherty interview, pp. 1–2.

[100] Dougherty interview, p. 2. *See* South Dakota Division of Human Rights, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, March 1998.

[101] *See* Norman Lindell, Deputy Director, State of West Virginia Human Rights Commission, letter to Rebecca Kraus, USCCR, Mar. 31, 1998.

[102] EEOC's funding relationship with the FEPAs began in 1966 with a small research contract. Currently, funds to pay FEPAs are provided as part of EEOC's annual appropriations. EEOC, "FEPA Task Force Report," p. III–5; EEOC 1992–97 Budget Reports.

[103] EEOC, "FEPA Task Force Report," pp. III–5; V–1. The "fee" for the 48,486 "dual filed" charge resolutions was $500 per charge and $50 for each of the 2,067 intake charges. Ibid., p. V–1.

[104] Most FEPAs have title VII contracts; however, some do not have ADA or ADEA contracts. *See* EEOC, "FEPA Task Force Report," p. X–3.

[105] Ibid., p. III–8.

A FEPA must meet certain requirements to be eligible for a contract. A State or local agency must have been "designated" as a FEPA for at least 4 years before its work can be "certified" by EEOC.[107] To become a "designated" FEPA, the State or local agency must be in a locality that has a fair employment practice law and must be an agency or authority empowered to seek or grant relief or institute criminal proceedings under the law. In addition, the agency must submit a written request to the Director of Field Programs with a copy of its fair employment practice laws and regulations.[108]

According to EEOC's Director of State and Local Programs, EEOC reviews the State laws to determine if they are compatible with the Federal laws; they also may review the local regulations. Because not all laws are compatible, FEPA contracts may specify that only certain statutes may be handled by the FEPA.[109] For instance, the FEPA for the State of Tennessee does not investigate ADA complaints where an individual requires reasonable accommodation, because the Tennessee State statute does not allow the FEPA to require an employer to provide reasonable accommodation to an individual with a disability.[110] However, FEPAs that have more stringent requirements are authorized to handle dual-filed cases. For example, the Director of Enforcement for the Washington State Human Rights Commission noted two differences between the ADA and the Washington State Law Against Discrimination (RCW 49.60). The State law covers employers of 8 or more employees, while the ADA covers employers of 15 or more. Further, the State administrative rule (WAC 162-22-040 (1) (a), (b)) defines disability to include temporary medical conditions that are excluded from the Federal law.[111] Similarly, the disability employment law for the State of Maine includes all employers with at least one employee.[112]

A certified FEPA is a State and local agency that has been recognized by EEOC as having consistently produced quality work conforming to EEOC guidelines, has been a FEPA for at least 4 years, and has had at least 95 percent of its charge resolutions accepted for contract credit by EEOC in the most recent 12-month period.[113] In fiscal year 1994, 75 of the 84 FEPAs under contract were certified.[114] Once a FEPA is certified, EEOC automatically accepts a certain percentage of the FEPA's title VII charge resolutions.

The Equal Employment Opportunity Act of 1972, which amended title VII, requires that EEOC give "substantial weight" to final findings and orders of State and local agencies.[115] Currently, EEOC uses a Substantial Weight Review process to determine whether a FEPA's resolution of dual-filed charges meets EEOC standards. The purpose of the review is to ensure that all jurisdictional requirements have been met, all evidence or information meets EEOC guidelines and standards for investigation, all parties were notified properly of the charge resolution, and that the time period for FEPA appeal, if applicable, has elapsed.[116] The review requires EEOC to examine all documentation obtained by the FEPA during its investigation of a dual-filed charge.[117]

Before certification of a FEPA, EEOC conducts Substantial Weight Reviews of 100 percent of the FEPA cases. Once a FEPA is certified, EEOC does a Substantial Weight Review of only a portion of the FEPA's cases.[118] A Substantial

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[106] Ibid., pp. III–1–2, 5, and 8.

[107] Ibid., p. V–1.

[108] Ibid., pp. V–1–2.

[109] Dougherty interview, p. 2.

[110] Ronald L. Hardaway, Administrative Services Assistant, State of Tennessee Human Rights Commission, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 10, 1998, attachment, p. 2 (hereafter cited as Hardaway letter).

[111] Edmon Lee, Director of Enforcement, Washington State Human Rights Commission, State of Washington Human Rights Commission, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 17, 1998, enclosure.

[112] Patricia E. Ryan, Executive Director, Maine Human Rights Commission, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 14, 1998, enclosure.

[113] EEOC, "FEPA Task Force Report," p. VIII–3.

[114] Ibid., p. VIII–5.

[115] Pub. L. No. 92–261, § 4, 86 Stat. 103, 104 (codified at 42 U.S.C. § 2000e–5(b) (1994)).

[116] EEOC, "FEPA Task Force Report," p. VIII–1.

[117] Ibid.

[118] Ibid., p. V–1. The parties to the charge can request a Substantial Weight Review through a written request

Weight Review also is done if a charging party is adversely affected by the FEPA's decision. The charging party must make such a request within 15 days of the FEPA decision.[119]

EEOC requires that a minimum of 25 percent of title VII charges from certified FEPAs receive Substantial Weight Review. ADA and ADEA charges do not count toward the minimum requirement for title VII. In 1994, 36.4 percent of the title VII charges were given Substantial Weight Review.[120] In fiscal year 1994, EEOC field offices did 25,065 Substantial Weight Reviews for title VII, ADEA, and ADA, of which 98.5 percent (24,346) were accepted and 2.5 percent (727) were rejected.[121] It is unknown how many of the cases rejected were ADA charges.

In 1995 the contracting principles required that no more than 10 percent of a FEPA's charge resolutions for contract credit could be attributable to the ADA.[122] The 10 percent ceiling was imposed because of the "novelty of the legal issues involved, the possibility that state disability statutes may differ in substance from the ADA, and as an incentive to close the gap in FEPA backlogs for aging inventory filed under other statutes."[123] However, the 10 percent limitation on acceptance for contract credit did not mean that the FEPAs' overall workload consisted of 10 percent disability investigations. For example, in 1995, the FEPAs processed more disability charges under their own disability statutes. The 10 percent limitation only meant that the FEPAs were not eligible for payment for those ADA cases exceeding the 10 percent ceiling, which was removed in the 1996 contracting principles.[124]

EEOC's National Enforcement Plan encourages "joint investigative and enforcement activities" between field offices and FEPAs, and solicitation of suggestions from the FEPAs in developing their Local Enforcement Plans.[125] Currently, there is little coordination between FEPAs and local EEOC offices in investigations. EEOC occasionally assists FEPAs with subpoena enforcement or by filing an *amicus* brief for a FEPA case.[126] In addition, there may be local events in which both a FEPA and EEOC office do outreach activities.[127]

EEOC does provide some training and technical assistance to FEPA staff, within budgetary constraints. For instance, one FEPA reported to the Commission that "[s]hortly after the ADA statute went into effect, the EEOC provided an education session covering its regulations, guidelines and statute. Since then the [FEPA] and the EEOC [have]. . .maintained a continuous dialogue coordinating the process to insure that it operates as efficiently as possible."[128] The task force on the relationship between EEOC and FEPAs recommended that a comprehensive training program be developed to meet the needs of the FEPAs. Such a program should include training on State and local program procedures; substantive information (e.g., legal theories, investigative techniques, EEOC policy guidance, etc.); outreach and community relations; and management and administration.[129] EEOC's FEPA task force recommended that EEOC hold joint training with the International Association of Official Human Rights Agencies and the National Association of Human Rights Workers.[130]

FEPA staff reported that local EEOC offices currently provide them with training, informal guidance, and other forms of technical assistance.[131] For example, one FEPA noted: "Because

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within 15 days from notification of the FEPA final finding. Ibid., p. VIII–4.

[119] 29 C.F.R. § 1601.76 (1997). *See* Dougherty interview, p. 3.

[120] EEOC, "FEPA Task Force Report," p. VIII–5.

[121] Ibid.

[122] EEOC, "EEOC's FY 1995 Contracting Principles for State and Local FEP Agencies," Aug. 5, 1994, p. 19.

[123] EEOC, "FEPA Task Force Report," p. VI–4.

[124] *See* EEOC, "Fiscal Year 1996 Contracting Principles for State and Local Fair Employment Practices Agencies," Sept. 13, 1995.

[125] EEOC, "National Enforcement Plan," p. 10.

[126] Leslie L. Goddard, Director, Idaho Human Rights Commission, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 27, 1998. *See* Dougherty interview, p. 3.

[127] Dougherty interview, p. 3.

[128] Hardaway letter, attachment, p. 2.

[129] EEOC, "FEPA Task Force Report," pp. XIII–1 to XIII–4.

[130] Ibid., p. XIII–3.

[131] *See* Donald E. Newton, Manager, State of Connecticut Commission on Human Rights and Opportunities, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 2, 1998; State of Wyoming Department of Employment, Division of Labor Standards, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998; Leslie L. Goddard, Director, Idaho Human Rights Commission, letter to Frederick D. Isler, Assistant Staff Director, OCRE,

ADA is new and broader in scope than previous statutes protecting the rights of persons with disabilities, training is vital to implementation and enforcement of the statute. To that end, EEOC has provided extremely valuable training to our compliance staff."[132] In addition, FEPA directors attend an annual meeting, usually at EEOC headquarters, which provides training on different areas.[133] However, the FEPA task force report stated that this training was not sufficient to meet the needs of all FEPA staff.[134]

Past Performance and Recent Initiatives

Ever since its creation in 1964,[135] EEOC's attainment of its goals has been hampered by seemingly insurmountable problems. In contrast to its broad jurisdiction, EEOC has been provided only limited means to enforce the statutes under its jurisdiction. In the beginning, EEOC was to eliminate employment discrimination through "informal methods of conference, conciliation and persuasion," but had no enforcement powers to penalize those who violated the law.[136] Further, management turnovers, insufficient staff, limited funding, lack of training, and an enormous backlog in cases have been persistent obstacles for EEOC.[137] Throughout the 1980s and 1990s decreases in staff, increases in the number of charges filed, and budget problems have hindered the ability of EEOC to accomplish its mission.[138] Further, the enactment of the ADA in 1990 and the Civil Rights Act of 1991 resulted in a 26 percent increase in the number of charges filed.[139]

When former Chairman Gilbert F. Casellas came into office in October 1994, he appointed three task forces to chart a new course in charge processing systems for the EEOC. These task forces analyzed alternative dispute resolution, charge processing, and State and local fair employment practices agencies. Each task force assessed its respective area in depth.[140] In 1995, as a result of task force recommendations, EEOC streamlined its charge processing procedures. In addition, EEOC rescinded three enforcement, administrative, and litigation policies:

- the "full investigation" policy that required the agency to investigate fully each charge it received in the order in which it was received;
- the "full remedies" policy that required the agency to seek resolutions, including full remedies, for all meritorious cases; and

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USCCR, Mar. 27, 1998; Winona Lake, Interim Associate Director, Government of the District of Columbia, Department of Human Rights and Local Business Development, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 25, 1998.

[132] Willis C. Ham, Commissioner, State of South Carolina, Human Affairs Commission, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 25, 1998.

[133] Dougherty interview, p. 3.

[134] EEOC, "FEPA Task Force Report," p. XIII–2.

[135] Civil Rights Act of 1964, Pub. L. No. 88–352, § 705, 78 Stat. 241, 258 (1964) (codified as amended at 42 U.S.C. § 2000(e)–4(a) (1994).

[136] USCCR, *Federal Civil Rights Enforcement Effort, 1971*, p. 86.

[137] Ibid., pp. 87–88; USCCR, *The Federal Civil Rights Enforcement Effort—1974: Vol. V, To Eliminate Employment Discrimination*, July 1975 (hereafter cited as USCCR, *The Federal Civil Rights Enforcement Effort—1974, Vol. V*).

[138] USCCR, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance* (Clearinghouse Publication 82, Washington, DC: U.S. Government Printing Office, November 1983) (hereafter cited as USCCR, *Federal Civil Rights Commitments*); GAO, *EEOC and State Agencies Did Not Fully Investigate*, p. 2; USCCR, *Federal Enforcement of Equal Employment Requirements* (Washington, DC: U.S. Government Printing Office, July 1987) (hereafter cited as USCCR, *Federal Enforcement of Equal Employment Requirements*).

[139] *EEOC: An Overview: Hearings Before the Subcomm. on Select Education and Civil Rights of the House Comm. on Education and Labor*, 103d Cong. (1993) (statement of Linda G. Morra, Director, Education and Employment Issues, Human Resources Division, General Accounting Office) (hereafter cited as GAO, *EEOC Overview*); *Hearings to Review the Equal Employment Opportunity Commission: Hearing Before the House Comm. On Education and Workforce*, 105th Cong. 1–2 (Oct. 21, 1997) (statement of William H. Brown, III, Esq., Schnader, Harrison, Segal & Lewis) (hereafter cited as Brown testimony).

[140] EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 5. Three new task forces have been formed to assess certain areas and formulate recommendations for action. Two were assigned the task of reviewing changes made in charge processing and the agency's litigation program to assess their effectiveness and whether modifications need to be made. The third task force is examining industry practices in the area of equal employment opportunity. EEOC, "Strategic Plan: 1997–2002," OMB Review Copy, Aug. 18, 1997 (hereafter cited as EEOC, "Strategic Plan," pp. 20–1).

- the "statement of enforcement" policy which provided that all cause cases in which conciliation failed would be recommended for litigation.[141]

In April 1995, EEOC adopted new procedures. They called for charges of discrimination to be handled in order of priority, with the most meritorious charges being processed first, charges with possible merit being processed second, and charges with little likelihood of merit being closed expeditiously.[142] Under these procedures, charges are categorized into three categories: (1) "A" charges (or priority charges under the enforcement plans), which are likely to result in cause findings, and charges that may result in irreparable harm if not resolved quickly; (2) "B" charges, which require further investigation to determine if they are likely to lead to cause findings; and (3) "C" charges, which are not likely to result in cause findings. Charges in the latter category are to be closed immediately.[143]

National Enforcement Plan

One of the key recommendations of the Task Force on Charge Processing, whose recommendations were adopted unanimously by the Commissioners in April 1995, was that the EEOC develop national and local enforcement plans to set priorities.[144] In February 1996, EEOC issued its National Enforcement Plan (NEP).[145] The NEP identifies priority issues and sets forth a plan for administrative enforcement and litigation of title VII, ADEA, EPA, and ADA.[146] The NEP calls for EEOC to eliminate discrimination through a three-pronged strategy: (1) education and outreach; (2) voluntary resolution of disputes; and (3) where voluntary resolution fails, use of strong and fair enforcement.[147] To carry out its mission, the NEP calls for EEOC to implement extensive public education and technical assistance at both the national and local level and to implement voluntary resolution through the use of alternative dispute resolution.[148] "Firm and fair" enforcement is viewed as critical to the EEOC mission; it will include investigation and litigation when efforts to achieve voluntary compliance fail.[149]

Following the strategy of prioritizing charges adopted in April 1995, the NEP stresses that "the combination of limited resources and increasing demands" requires EEOC to implement a "prioritized" enforcement strategy.[150] The NEP added substance to the new priority charge processing procedures by spelling out more clearly which issues in charges would be given the highest priority. The NEP acknowledges that, given limited resources, EEOC "cannot be all things to all of its various constituencies" and that "a carefully prioritized and coordinated enforcement strategy" is necessary for EEOC to achieve its mission.[151]

Under the NEP, the first category of priority charges ("A") includes "cases involving violations of established anti-discrimination principles, whether on an individual or systemic basis, including Commissioner-charged cases raising issues under the NEP, which by their nature could have a potential significant impact beyond the parties to the particular dispute." This category includes cases "involving repeated and/or egregious discrimination" and "challenges to broad-based employment practices affecting many employees or applicants." The second category of priority charges is those with the potential of promoting law that supports the antidiscrimination purposes of the covered statutes. The NEP explicitly includes charges raising questions as to the interpretation of the ADA, and other antidiscrimination laws, within this category. It also includes cases where there has been a conflict in the Federal circuit courts on issues for which EEOC desires Supreme Court resolution. The third category of priority charges includes those cases that involve the integrity or effectiveness of EEOC's enforcement process (such cases including allegations of retaliation, challenges of EEOC policy guidance or regulations, or breach of an agreement in a charge that was settled earlier).[152]

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[141] Brown testimony, p. 2.

[142] EEOC's priority charge handling procedures are assessed in chap. 5.

[143] EEOC, "Priority Charge Handling Procedures," pp. 4–5.

[144] EEOC, "Charge Processing Task Force Report," Executive Summary.

[145] In a motion unanimously adopted on Apr. 19, 1995, the Commission accepted the Charge Processing Task Force's recommendations and directed the development for its approval of a National Enforcement Plan identifying priority issues and setting out a plan for administrative enforcement for all laws within its jurisdiction. EEOC, "National Enforcement Plan," February 1996.

[146] EEOC, "National Enforcement Plan," p. 1.

[147] Ibid., p. 2.

[148] Ibid., pp. 2–3. Alternative dispute resolution (ADR) facilitates voluntary alternative methods to resolve charges. It focuses on early resolution of disputes where agreement between the charging and alleged discriminating parties is possible without using formal processing procedures.

[149] EEOC, "National Enforcement Plan," p. 3.

[150] Ibid., pp. 3–4.

[151] Ibid., p. 3.

The NEP indicates that the priority of the charge dictates the immediate attention it receives and the methods for resolving the charge. Determination of whether a case should be pursued under the NEP is based on the issue raised and an assessment that the strength of the case supports the decision to continue with the charge.[153] These priorities apply to all of the statutes, and apply, as appropriate, to EEOC's investigation, conciliation and litigation, including trial, appellate, and *amicus curiae* participation.[154]

According to some EEOC staff, the work of the agency has not changed greatly since the implementation of the National Enforcement Plan. An Assistant General Counsel in Systemic Enforcement Services stated that the work of his office has changed only in that litigation issues are generally determined in advance as informed by the NEP.[155] A trial attorney in the New York District Office said that her job duties had not changed much since the implementation of the NEP and the new charge processing procedures. However, there is currently more of a focus on meritorious cases and a clearer sense of priorities.[156] Similarly, an investigator in the Boston Area Office stated that her workload has remained the same; the only difference is that now they categorize cases and can identify the direction they will take in investigating a charge.[157]

Other staff members have noted great changes since the NEP was introduced. For example, an Assistant General Counsel in Litigation Management Services stated that since the NEP was adopted, staff members are able to make strategic decisions because they no longer are committed to investigate fully every charge. Although the oversight and litigation support functions of the Litigation Management Services unit have not changed greatly, the unit now is more involved in litigation development than before, because EEOC staff has more flexibility to choose cases.[158]

Local Enforcement Plans

The NEP required that each district director and regional attorney develop a Local Enforcement Plan (LEP) and submit it to the Commission, the General Counsel, and the Director of the Office of Field Programs.[159] The LEPs should include the following components:

A. An evaluation and strategy to address the provision of Commission services to underserved populations and geographic regions, as well as employment practices of particular importance in the region served by each district office.
B. A description and identification of the local issues which are in the National Enforcement Plan.
C. A description of each office's plan to resolve the pending cases in the office's inventory, including the long term plans to use Alternative Dispute Resolution techniques as part of its charge processing activities.[160]

Each district office must also submit a document detailing its plan to implement the LEP. This implementation document should describe the district office's strategy for meeting its objectives and using its resources, as well as give headquarters information for planning, staffing and the allocation of resources in the field.[161] The document should prioritize and justify the issues identified in the LEP; identify pending charges/suits that fall within the local priority list and indicate those that would have greater impact; identify charges that can be pursued with the resources; and describe how the results will be achieved, including timelines.[162]

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[152] Ibid., pp. 4–6.

[153] Ibid., p. 3.

[154] Ibid., p. 4.

[155] Letwin interview, p. 2.

[156] Katherine Bissel, Trial Attorney, New York District Office, EEOC, telephone interview, Apr. 8, 1998, pp. 1–2.

[157] Dubey interview, p. 1.

[158] Scanlan interview, p. 2.

[159] EEOC, "National Enforcement Plan," p. 7.

[160] Ibid.

[161] Ibid.

[162] Ibid., pp. 7–8.

Although the LEPs are linked to the NEP, each district was instructed to identify its own enforcement priorities and target population. According to former Chairman Gilbert Casellas, although the ADA was targeted in the NEP, only 17 percent of the LEPs targeted the ADA as a high priority.[163]

The district offices used different methods for identifying priorities. The Chicago District Office, for example, relied on input from top staff, including the district director, the deputy directory, the regional attorney, and enforcement managers. This office compiled a list of issues on which it wanted to focus. The office had always targeted downstate Illinois, and Hispanics, African Americans, and Asian Americans.[164] The Charlotte District Office developed its Local Enforcement Plan through extensive work with the community. According to the district director, 21 meetings were held with various groups to identify their concerns. Further, the office identified underserved areas by analyzing its database of cases.[165] The district director in Dallas said that outside stakeholders were invited to provide input into the LEP; however, because the office had a short deadline, staff did not get much response from outside groups. Thus, the plan was primarily developed by staff.[166]

The various methods for developing LEPs and the geographic differences among district offices led to a variety of enforcement priorities. For example, the Albuquerque District Office will focus on outreach and education, identifying local enforcement priorities, and developing a plan for workload resolution. Its outreach and education efforts will be targeted towards Native Americans, Hispanics, African Americans, persons over 40 years of age, individuals with disabilities, and women. The Albuquerque District Office LEP also identifies 13 major issues, including sexual harassment; speak-English-only rules; individuals with disabilities who have been denied employment opportunities; disability bases of diabetes, visual or hearing impairments, HIV, and life-threatening conditions; and *per se* violations of preemployment hiring practices.[167] The LEP does not describe how nonpriority cases will be handled.

In comparison, the Charlotte District Office identifies 23 local priority issues, which include definitions under the ADA, discrimination against persons with communicable diseases, and unlawful medical screening under the ADA. In addition, local priorities for the Charlotte District Office include general civil rights issues, such as discrimination against persons in underserved groups, retaliation, disparate impact, and broad-based employment practices. The LEP states, "Of course, the office will continue to pursue meritorious charges and cases that do not fall within the enumerated priorities, as is consistent with the Commission's statutory responsibilities."[168]

District offices state that their LEPs were developed in concert with the NEP, the priority charge handling procedures, and input from local stakeholders.[169] However, little detail is provided on the process used to identify and prioritize issues, other than identifying issues based on the case inventory and input from stakeholders.[170] It is unclear whether each district office followed the same approach. Although the NEP states that each office should develop a document describing how it will implement its LEP and that the document should justify the LEP's prioritization, this has not been uniformly included in the LEPs.[171]

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[163] Gilbert Casellas, Chairman, and Peggy Mastroianni, Associate Legal Counsel, EEOC, interview in Washington, DC, Nov. 25, 1997, p. 3 (hereafter cited as Casellas interview).

[164] Julie Bowman, Enforcement Manager, Chicago District Office, EEOC, telephone interview, Apr. 8, 1998, pp. 1–2.

[165] Drane interview, p. 2.

[166] Jacqueline Bradley, Director, Dallas District Office, EEOC, telephone interview, Apr. 16, 1998 (hereafter cited as Bradley interview).

[167] EEOC, Albuquerque District Office, "Local Enforcement Plan," Mar. 6, 1997, pp. 1–5.

[168] EEOC, Charlotte District Office, "Local Enforcement Plan," pp. 13–16.

[169] *See* EEOC, Cleveland District Office, "Local Enforcement Plan," July 12, 1996, p. 2.

[170] U.S. Equal Opportunity Commission, San Antonio District Office, "Local Enforcement Plan," draft, Oct. 7, 1996, p. 3.

[171] EEOC, "National Enforcement Plan," p. 7. Some district offices appear to have included the implementation plan in the LEP. *See* EEOC, Houston District Office, "Local Enforcement Plan." Further, the Commission was provided only the "public portions" of the LEPs; thus, this information may not be publicly available. Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick Isler, Assistant Staff Director, OCRE, USCCR, Mar. 6, 1998, p. 3. For example, section D–2 of the St. Louis District Office LEP,

Each LEP also identifies outreach strategies. For example, the Los Angeles District Office held "Public Outreach Month" in June 1996. During that month, public meetings were held with constituency groups, and public service announcements were made on television and radio stations and printed in local media. In addition, talk show appearances were scheduled on local Spanish and Asian language cable television stations.[172] According to EEOC staff in the Los Angeles District Office, southern California is a very diverse area. In 1997, their outreach efforts focused on the Hispanic community. Staff scheduled several meetings with migrant workers in which they took charges, held training sessions, and provided other information.[173] Similarly, the district director in Dallas noted that the LEP is provided to stakeholder groups at technical assistance and outreach programs. For example, she has worked with chambers of commerce and various bar associations, and has given it to them.[174]

The LEP for the Milwaukee District Office provided a schedule of speeches to be given by the area office director, program analysts, senior trial directors, a Minneapolis Area Office representative, and the regional attorney. This LEP also outlined plans for offering seminars, developing an Internet home page, sending mailings and newsletters to interested groups, writing and compiling newspaper articles, appearing on local media shows, and participating in meetings, community forums, and roundtables.[175] Information on costs and resources required for such activities is not included in the LEPs.

The 1998 joint report of the Priority Charge Handling Task Force and the Litigation Task Force recommended that LEPs be revised so that goals are clearly stated and achievable. The report acknowledged that headquarters had not provided appropriate guidance for development of the LEPs, resulting in LEPs that "have not consistently served the purpose intended by the Commission in the NEP."[176] The report further stated: "The LEPs are so different in format that they are difficult to use. . . .some viewed the LEP as an aspirational document, while others treated it as a contract for performance."[177] The report noted that LEPs should include quantitative and qualitative measures of performance, increased emphasis on the use of Commissioner charges and directed investigations, and more proactive outreach, especially targeted toward underserved groups.[178]

The 1998 joint task force report also noted that the field offices did not adequately coordinate with local stakeholder communities when determining their LEP priorities. Although the process may not yield immediate results, it is crucial that field offices develop relationships with EEOC's customers "if the Commission is to be an effective civil rights enforcement agency serving the nation as a whole."[179] According to the joint task force, LEPs should clearly show how outreach will be used to accomplish the objectives of the LEPs and overcome barriers that have caused groups to be underrepresented. The task force report further notes that EEOC must use media resources to explain to the public its mission and the purpose of its litigation and enforcement activities.[180]

In EEOC's April 1998 Commission meeting, Acting Chairman Igasaki presented several recommendations in response to the joint report of the Priority Charge Handling Task Force and the Litigation Task Force. The Acting Chairman recommended that the Local Enforcement Plans should be contracts between headquarters and field offices. The Office of Field Programs (OFP) and the Office of General Counsel (OGC) were instructed to design and implement a uniform LEP format "that contains sufficient detail to

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which ranks each priority issue and justifies its selection as a priority, was not provided to the Commission. *See* U.S. Equal Opportunity Commission, St. Louis District Office, "Local Enforcement Plan," p. 2.

[172] EEOC, Los Angeles District Office, "Local Enforcement Plan," 1996–1997, p. 10.

[173] Rosa Viramontes, Enforcement Manager, Los Angeles District Office, EEOC, telephone interview, Apr. 19, 1998, p. 2 (hereafter cited as Viramontes interview).

[174] Bradley interview.

[175] EEOC, Milwaukee District Office, "Local Enforcement Plan," July 1, 1996, pp. 8–13.

[176] EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*, March 1998, p. 32 (hereafter cited as EEOC, *March 1998 Task Force Report*).

[177] Ibid.

[178] Ibid., pp. iv–v.

[179] Ibid., p. 11.

[180] Ibid.

evaluate an office's use of its resources in obtaining results in NEP/LEP Cases."[181] Acting Chairman Igasaki also directed the General Counsel and the Director of the Office of Field Programs to form a National Enforcement Strategy Group to develop methods of monitoring the implementation of the NEP and LEPs. Further, the Acting Chairman directed OFP and OGC to prepare an analysis of the effect of the fiscal year 1999 LEPs.[182]

1997–2002 Strategic Plan

In accordance with the mandate of the Government Performance and Results Act of 1993 (GPRA),[183] EEOC developed its 1997-2002 Strategic Plan and submitted it to the Office of Management and Budget (OMB) for review in August 1997.[184] Under GPRA each Federal agency is required to develop a strategic plan that includes a mission statement covering the major functions of the agency, general goals and objectives; a description of how to accomplish the goals and objectives (including a description of the operational processes, skills, and technology and human capital, information, and other resources required); an explanation of how performance goals are to be related to the goals and objectives of the strategic plan; an identification of external factors that could affect the achievement of the goals and objectives; and a description of how program evaluations are to be used in establishing or revising the goals and objectives.[185] The GPRA also specifies that annual performance plans shall be included in each agency's budget. Such plans shall establish performance goals, express such goals in measurable form, describe resources required to achieve performance goals, establish performance indicators to assess outputs and outcomes, and provide a basis for comparing program results to performance goals.[186]

EEOC's Strategic Plan summarizes its historical mandate, the evolution of its mission and responsibilities, and EEOC's recent and ongoing initiatives designed to permit it to carry out its mission and responsibilities consistent with GPRA. The Strategic Plan also highlights the positive results the agency has obtained, such as a reduction in its backlog and the collection of "over 425 million dollars for victims of discrimination over the past two and one-half years."[187] To carry out EEOC's mission, the Strategic Plan states that Federal laws will be enforced through a wide range of activities, including administrative and judicial actions through investigation, adjudication, settlement, conciliation, alternative dispute resolution, litigation, policy guidance, education, technical assistance, and outreach.[188] The plan also identifies two major goals to achieve its mission, as well as subgoals and objectives. The first goal is to "promote equal opportunity in employment by enforcing the Federal civil rights employment laws through administrative and judicial actions."[189] The second goal is to "promote equal opportunity in employment by enforcing the Federal civil rights employment laws through education and technical assistance."[190] These general goals echo the mission of the agency.

Subgoals under the first general goal are: improving the effectiveness of the administrative process and litigation program, improving processing of Federal equal employment opportunity complaints, and working with State and local FEPAs and tribal employment rights organizations to improve charge processing. Subgoals under the second general goal are: encouraging and facilitating voluntary compliance and increasing knowledge about rights under equal employment opportunity laws.[191] The EEOC Strategic Plan also identifies a general supporting objective, which is to enhance the effectiveness of employees in achieving the agency's mission and general goals. The plan identifies the following activities to achieve this: enhance staff capabilities and knowledge; evaluate organizational components, procedures, and processes; and improve technological competency.[192]

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[181] Paul M. Igasaki, Acting Chairman, EEOC, Recommendations made at EEOC Commission meeting, Apr. 21, 1998.

[182] Ibid.

[183] 5 U.S.C. § 306 (1994).

[184] A strategic plan is required of all Federal agencies under the Government Performance and Results Act, signed by President Clinton in 1996. The plan should set out long term goals and objectives for which an agency can be held accountable. *See* EEOC, "Strategic Plan: 1997–2002," OMB Review Copy, Aug. 18, 1997, p. 1 (hereafter cited as EEOC, "Strategic Plan").

[185] 5 U.S.C. § 306 (1994).

[186] 31 U.S.C. § 1115 (1994).

[187] EEOC, "Strategic Plan," p. 16.

[188] Ibid., p. 34.

[189] Ibid., p. 36.

[190] Ibid., p. 38.

[191] Ibid., pp. 36–38.

EEOC's Strategic Plan does not develop fully many of the items required by the GPRA. According to testimony before the House Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce, the EEOC Strategic Plan "suffers from diffuse generalizations and does not provide the reader with specific yardsticks by which performance can be measured."[193] The Strategic Plan discusses the inherent problems in measuring the outcomes of its activities, pointing out that "outcome measures simply do not exist for gauging the extent of equal opportunity—or discrimination—in the American workforce."[194] Nonetheless, the Strategic Plan states that examples of EEOC's successes can be used as qualitative measures of EEOC's accomplishments.

EEOC's Strategic Plan also does not establish clear performance measures. Agencywide goals are identified, along with a discussion of circumstances that could cause EEOC to not reach its goals, as required by OMB Circular A–11.[195] The plan states that the agency's limited resources could affect whether it can meet these goals and objectives: "Even with level funding, we cannot maintain the same level of activity from year to year where price and/or workload increases erode our ability to function. In 1997, [EEOC] has more responsibility than [it has] ever had, but [is] operating with the fewest number of employees in twenty years."[196]

Little detail on how to achieve the goals is provided.[197] For example, the first two-thirds of the document discusses EEOC's past accomplishments. The plan later identifies factors that could limit EEOC's ability to achieve its goals: limited resources, increasing workload, changes in statutory authority, and changes in the economy.[198] EEOC plans to evaluate its progress based on the findings of three task forces, "additional evaluations," and the inclusion of a program evaluation component in the Annual Performance Plan.[199] The Strategic Plan does not elaborate further on these evaluation processes. Thus, it is unclear how EEOC plans to evaluate its progress and implement changes.

In addition, the Strategic Plan is not linked to the budget. It does not discuss how the general goals will affect, or require changes in, budget and resource levels. Although funding is identified as a factor that could affect EEOC's achievement of its goals,[200] staffing and resource levels required to implement the Strategic Plan are not identified in the document. Further, the Strategic Plan does not include a strategy for achieving the goals in the absence of increased funds. EEOC acknowledges that it "does not receive a large budget for the critical civil rights functions mandated."[201] This fact is not accounted for in EEOC's strategic planning, and priorities do not reflect the reality of limited funding.

1998 Task Force Reports

In concert with EEOC's role in providing technical assistance and outreach, former Chairman Casellas appointed a task force to study the equal employment opportunity policies, practices, and programs of private employers. In its February 1998 report, the task force identified businesses that have "noteworthy business practices" in the areas of recruitment and hiring, promotion and career advancement, terms and conditions, termination and downsizing, alternative dispute resolution, and other human resources management issues.[202] The task force report provides examples of employers who have model programs, as well as contact

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[192] Ibid., p. 39.

[193] Cathcart testimony.

[194] EEOC, "Strategic Plan," p. 23.

[195] U.S. Office of Management and Budget, *Circular No. A–11, Part 2,* "Preparation and Submission of Strategic Plans and Annual Performance Plans," June 1997, §§ 210.7, 210.10.

[196] EEOC, "Strategic Plan," pp. 40–41.

[197] *See* ibid.

[198] Ibid., pp. 40–42.

[199] Ibid., pp. 43–44.

[200] Ibid., pp. 40–41.

[201] Ibid., p. 40.

[202] EEOC, "Task Force Report on 'Best' Equal Employment Opportunity Policies, Programs, and Practices in the Private Sector," February 1998, p. 3 (hereafter cited as EEOC, "Best Practices Task Force Report").

TABLE 3.2
EEOC's Budget, Staffing, and Workload, Fiscal Years 1989–1997

		FY 1989	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997
1	Total appropriations (thousands of $)	180,712	184,926	201,930	211,271	222,000	230,000	233,000	233,000	239,740
2	Total appropriations (thousands of 1992 $)	215,954	202,083	207,918	211,271	211,751	211,630	205,485	199,333	198,542
3	FTEs	2,970	2,853	2,796	2,791	2,831	2,832	2,813	2,676	2,586
4	Total private sector charges received	55,952	59,426	63,836	72,302	87,942	91,189	87,529	77,990	80,625
5	Total private sector charges resolved	64,028	68,366	71,716	71,563	91,774	103,467	106,188		
6	Pending inventory	46,071	41,987	45,717	52,856	73,124	96,945	98,269	80,890	64,576
7	Staff available	838.1	762.2	727.1	736.3	738.3	732.1	760.9	744.2	795.1*
8	Resolutions per staff available	79.0	88.4	88.1	92.8	97.1	97.8	120.6	139.0	132.5
9	Caseload per staff available	55.0	55.1	62.9	71,8	99.0	132.4	129.1		81.2
10	ADA charges			N/A	999	15,245	18,853	19,811	18,019	18,088
11	ADA charges as percentage of all charges			N/A	1.4	17.4	20.7	22.6	23.1	22.4

Sources:

Row 1: EEOC, "U.S. Equal Employment Opportunity Commission Historical Context of Budget and Staffing 1980 to Present," table provided by Mike Widomski, Public Affairs Specialist, Office of Communications and Legislative Affairs, EEOC. Note: 1995 figure does not reflect a $242,000 amendment reducing the budget for procurement spending and a $124,000 rescission. 1996 figures do not reflect the $260,000 reduction due to the Omnibus Consolidated Rescissions and Appropriations Act. EEOC Comments, p. 5.

Row 2: Row 1, deflated by Chain-type Quantity and Price Indices for Government Consumption Expenditures for Nondefense Federal Government Services, published by the Bureau of Economic Analysis.

Row 3: EEOC, "U.S. Equal Employment Opportunity Commission Historical Context of Budget and Staffing 1980 to Present," table provided by Mike Widomski, Public Affairs Specialist, Office of Communications and Legislative Affairs, EEOC.

Row 4: FY 1992–1996 data are from EEOC, tables to be included in fiscal year 1996 Annual Report, p. 28; FY 1991 data are from EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 6; FY 1989–1990 data are from GAO, *EEOC's Expanding Workload*, p. 10.

Row 5: FY 1992–1996 data are from EEOC, tables to be included in fiscal year 1996 Annual Report, p. 28, FY 1991 data are from EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 6.

Row 6: FY 1991–1995 data are from EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 6, FY 1989–1990 data are from GAO, *EEOC's Expanding Workload*, p. 11; FY 1997 data are from *Hearings Before the Subcomm. on Commerce, Justice, State, the Judiciary and Related Agencies of the House Comm. on Appropriations*, 105th Cong. 211 (Apr. 16, 1997) (statement of Gilbert F. Casellas, Chairman, EEOC).

Row 7: FY 1991–95 data are from EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 6. The figure for FY 1997 is not comparable to the figures for prior years. Due to changes in automated reporting, staff assigned to Systemic are included in totals for the first time. Thus, there probably was no actual increase between 1996 and 1997.

Row 8: FY 1992–1996 data are from EEOC, tables to be included in fiscal year 1996 Annual Report, p. 28; FY 1991 data are from EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 6. FY 1997 data are from Statement of Gilbert F. Casellas, Chairman, EEOC, Before the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, Committee on Appropriations, U.S. House of Representatives, Apr. 16, 1997, p. 212.

Row 9: FY 1991–1995 data are from EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 6.

Row 10: FY 1992–1995 data are from EEOC, Office of Program Operations, *FY 1995 Annual Report*, table 7, p. 20.

Row 11: Calculated from data in row 8 and row 9.

Note: Linda Lawson, Office of Field Programs, U.S. Equal Employment Opportunity Commission provided numbers that were missing from the above documents and corrected the data where necessary. N/A means not applicable. Where data are not available, the box has been left blank. * Due to changes in automated reporting, staff assigned to the systemic unit are included in totals for the first time in FY 1997.

information for employers wishing more information on the programs identified. However, the report does not include many examples of "best" practices for complying with the ADA. According to Commissioner Reginald Jones, the task force leader, the lack of information on the ADA in the report was a result of a low response rate to a request for information.[203] Further, because the ADA is handled on a *case-by-case* basis, it may not be incorporated into many *comprehensive* equal employment opportunity programs.[204]

Chairman Casellas established two additional task forces in 1997. Because of their similar focus on the effectiveness of enforcement activities (the implementation of the new priority charge handling procedures and the success of EEOC's litigation program), the two task forces issued a joint report. The March 1998 report notes both strengths and weaknesses of EEOC's enforcement programs. In particular, the report offers the following overall recommendations:

- increase collaboration and coordination of headquarters and field offices;
- revise the local enforcement plans to include "clear and achievable enforcement outcome goals";
- continue to reduce the charge inventory and focus on "strong" cases; and
- continue to encourage coordination between legal staff and investigators.[205]

Workload, Staffing, and Budget

In June 1995, the U.S. Commission on Civil Rights found that between fiscal year 1981 and fiscal year 1995, EEOC's workload had increased dramatically while its funding (adjusted for inflation) and staffing had declined steadily.[206] EEOC has argued repeatedly that it has too few resources to do the job.[207] According to several EEOC officials, resources are the primary obstacle to EEOC enforcement efforts.[208] The Acting Chairman stated that the primary problems resulting from the lack of resources have been fewer investigators, increasing burdens on investigators, more clerical duties required of operational staff, and fewer attorneys than previously.[209]

Workload and Staffing

Since EEOC became responsible for enforcing the ADA in 1992, EEOC's workload, in terms of charges of discrimination filed with the agency, has increased markedly. In fiscal year 1991, before the ADA took effect, EEOC received 63,836 private sector charges. Two years later, in fiscal year 1993, the first full year of ADA enforcement, EEOC received 87,942 private sector charges, an increase of 38 percent. Almost 21 percent of all charges received in 1993 were ADA charges. Thus, ADA charges accounted for most of the increase in EEOC's workload between fiscal year 1991 and fiscal year 1993. EEOC continued to receive higher numbers of charges in fiscal years 1994 and 1995 (91,189 and 87,529, respectively), with ADA charges accounting for 22.7 percent and 38.5 percent in 1994 and 1995, respectively. (See table 3.2.)

EEOC took steps to address the increased workload and was able to increase the number of resolutions per staff member from 88 in fiscal year 1991 to 121 in fiscal year 1995, largely through implementation of its new charge priority handling procedures in fiscal year 1995. The number of cases EEOC resolved rose gradually between fiscal year 1991, when 63,028 cases were resolved, and fiscal year 1994, when 71,563 cases were resolved. In fiscal year 1995, the year when the priority charge handling procedures were implemented, however, the number of cases resolved increased dramatically to 91,774, an increase of 28 percent over the previous year.

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[203] Reginald Jones, Commissioner, EEOC, interview in Washington, DC, Apr. 1, 1998, p. 3 (hereafter cited as Jones interview). In writing its report, the task force contacted companies with 25,000 or more employees; employers, employees, and civil rights associations; Federal agencies; and members of Congress. EEOC received materials from approximately 70 employers. EEOC, "Best Practices Task Force Report," pp. 18–20.

[204] Jones interview, p. 3.

[205] EEOC, *March 1998 Task Force Report*, p. 7.

[206] USCCR, *Funding Federal Civil Rights Enforcement*, p. 38.

[207] *See, e.g., Hearings Before the Subcomm. on Commerce, Justice, State, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 105th Cong. 214 (Apr. 16, 1997) (statement of Gilbert F. Casellas, Chairman, EEOC); EEOC, "Strategic Plan," p. 42; and EEOC, *FY 1994 Annual Report*, p. 3.

[208] *See* Igasaki interview, p. 1; Miller interview, p. 5; Vargyas interview, p. 1.

[209] Igasaki interview, p. 2.

As a result, EEOC's pending inventory, which had reached a high of 111,345 charges in the middle of fiscal year 1995, declined to 80,890 in fiscal year 1996.[210]

Although the number of new charges received by EEOC increased after the ADA took effect, the number of staff available to investigate charges did not increase. EEOC had 2,796 full-time equivalent staff (FTEs) in 1991. The number of FTEs increased slightly to above 2,800 in fiscal years 1993 through 1995, but by fiscal year 1997, the number of FTEs had declined to 2,586, below the fiscal year 1991 level. The number of staff available to process charges of discrimination increased slightly over the period from 1991 to 1995, from 727 to 761, but not enough to keep up with the increase in the number of charges of discrimination. From fiscal year 1991 to the beginning of fiscal year 1995, the average caseload per staff member available to process charges more than doubled, increasing from 63 to 145. Not surprisingly, EEOC's backlog, or its "pending inventory" of charges more than 180 days old, increased as well, rising from almost 46,000 in fiscal year 1991 to more than 98,000 in fiscal year 1995. (See table 3.2.)

Field office staff consists primarily of investigators and attorneys. For example, the Atlanta District Office employs 39 investigators (GS–9 through GS–12), 10 supervisory investigators (GS–13 and GS–14), 9 trial attorneys (GS–13 and GS–14), and 1 regional attorney (GS-15). The remaining 29 employees include administrative staff, legal support staff, an equal employment specialist, a computer specialist, an administrative officer, a budget analyst, and a program analyst.[211] Although some offices are organized into investigative teams, which can include investigators reporting to attorneys or attorneys assigned to assist investigators, this is not required of district offices.[212]

Staff do not specialize in distinct areas of civil rights or by statute. Attorneys and investigators are required to handle cases covering all statutes for which EEOC has jurisdiction, and all bases and issues. Former Chairman Casellas informed the U.S. Commission on Civil Rights that EEOC does not have "the luxury" to specialize by statute. EEOC cannot predict the types of cases it will receive. Further, given staffing restrictions, it would be difficult to manage the caseload of charges if staff members specialized.[213]

According to Commissioner Paul Steven Miller, specialized units of investigators to handle cases by statute would be inefficient. The complexities of the laws lead to overlap, and, thus, investigators must be knowledgeable about all the laws EEOC enforces.[214] An Assistant General Counsel for Litigation Management Services stated that it is not necessary for attorneys to specialize because EEOC only handles four statutes.[215] Similarly, the director of the Charlotte District Office said that the generalist approach is more appropriate to the types of cases EEOC handles.[216] An enforcement supervisor in the Chicago District Office reported that the office previously had specialized staff, but it found nonspecialization to be more efficient. Although by being generalists they lose some expertise, it ensures that all staff members are familiar with all four laws EEOC enforces.[217]

All staffing decisions are made by the Chairman.[218] According to Acting Chairman Igasaki, all headquarters positions are important to investigation, training, and other functions. When possible, vacant positions at headquarters are transferred to the field. However, it is cost prohibitive to relocate staff from one field office to another.[219] Thus, field offices forward requests for staff to the Field Management Programs unit in the Office of Field Programs. Field Management Programs staff prepares a prioritized list of positions that need to be filled, and forward the list to the Chairman for consideration. Staffing priorities are determined based on workload and the types of positions that are vacant. Field offices are also asked to identify their priorities.[220]

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[210] *Hearings Before the Subcomm. on Commerce, Justice, State, the Judiciary, and Related Agencies of the House Comm. on Appropriations,* 105th Cong. 211 (Apr. 16, 1997) (statement of Gilbert F. Casellas, Chairman, EEOC).

[211] Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick Isler, Assistant Staff Director, OCRE, USCCR, Mar. 6, 1998, attachment item B–6–8, pp. 3–4 (hereafter referred to as Mastroianni letter).

[212] EEOC, Commission meeting, Mar. 19, 1998.

[213] Casellas interview, p. 2.

[214] Miller interview, p. 3.

[215] Scanlan interview, p. 4.

[216] Drane interview, p. 2.

[217] Daniel McGuire, Enforcement Supervisor, Chicago District Office, EEOC, telephone interview, Apr. 10, 1998, p. 2 (hereafter referred to as McGuire interview).

[218] Miller interview, p. 3.

[219] Igasaki interview, p. 3.

The March 1998 joint task force report recommended that the agency continue to prioritize field positions over headquarters positions in hiring and staffing decisions. The report also recommended that staffing decisions should take into account attorney-investigator ratios, recognizing that many offices experience staff shortages in the key positions of support staff, paralegals, and attorneys. According to the report, "[t]here needs to be a sufficient number of attorneys in EEOC's field offices to provide guidance to field investigators while conducting a viable litigation program."[221]

Budget

EEOC's budget supports three major activities: (1) executive direction and program support (which includes funds for the direction and coordination of the Commission's programs, as well as for administrative and management support services); (2) enforcement (which includes funds to resolve charges of employment discrimination and litigate cases); and (3) State and local grants (which includes funds to State and local fair employment practices agencies to assist in resolution of employment discrimination complaints).[222]

Approximately 90 percent of its annual budget is used for enforcement, mainly in the private sector.[223] This includes salaries and overhead.[224] The remaining funds are used to pay fees for charge investigations by State and local fair employment practices agencies and provide program support, including education, outreach, technical assistance, and data collection.[225] In fiscal year 1995, EEOC reported that more than 80 percent of its $233 million budget supported investigation and litigation activities and about 90 percent of its 2,860 full-time equivalent positions were supporting "direct enforcement" of four Federal laws, title VII, EPA ADEA and the ADA.[226]

Despite the passage of the ADA in 1990 and the Civil Rights Act of 1991 the following year, which added considerably to EEOC's workload, EEOC's budget has not grown in the 1990s. In real terms, EEOC's budget has remained below the fiscal year 1989 level throughout the decade. In 1992 dollars, EEOC's fiscal year 1989 budget was $215,954,000. The budget fell considerably the following year, to $202,083,000 (in 1992 dollars). In each of the following years, as ADA implementation and enforcement began, EEOC's real budget rose slightly, reaching $211,271,000 in fiscal year 1992. EEOC's real budget remained constant in fiscal years 1993 and 1994 and then fell in each of the following fiscal years. EEOC's fiscal year 1997 budget was $198,542,000 in 1992 dollars, more than 8 percent below its fiscal year 1989 appropriation level. (See table 3.2.)

EEOC's fiscal year 1998 budget appropriation of $242 million is barely higher than its fiscal year 1997 budget appropriation of approximately $240 million. In real terms, the fiscal year 1998 budget appropriation is less than that of the previous year.[227] Although EEOC has made progress in reducing its backlog of charges since 1995, if the number of charges received by EEOC continues to grow as it has during the 1990s, EEOC may well experience an increase in its backlog unless it is appropriated additional resources.

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[220] Dudley interview, p. 3.

[221] EEOC, *March 1998 Task Force Report*, p. 23.

[222] *See* Budget of the United States Government, Fiscal Year 1992, Equal Employment Opportunity Commission, (hereafter cited as EEOC Fiscal Year 1992 Budget); Budget of the United States Government, Fiscal Year 1995, Equal Employment Opportunity Commission (hereafter cited as EEOC Fiscal Year 1995 Budget); Budget of the United States Government, Fiscal Year 1997, Equal Employment Opportunity Commission (hereafter cited as EEOC Fiscal Year 1997 Budget).

[223] GAO, *EEOC: An Overview*, p. 2.

[224] Casellas interview, p. 2. *See also* Miller interview, p. 5; Vargyas interview, p. 1.

[225] GAO, *Burgeoning Workload*, p. 4. For example, in fiscal year 1995, of the $233 million the agency received, approximately 80 percent (or $187 million) supported enforcement (investigation and litigation); 11 percent (or approximately $26.5 million) paid the fees for FEPA services (in fiscal year 1995, the FEPAs received a fee of $500 for each case they investigated for EEOC); and 9 percent (or $20 million) went for program support including technical assistance, education, and outreach.

[226] GAO, *EEOC: Burgeoning Workload*, pp. 2–9.

[227] *See* Nancy Montwieler, "Casellas Departure Means Uncertainty for Lead Civil Rights Enforcement Agency," *Daily Labor Report* (Dec. 29, 1997), pp. C1–C2.

According to the President's fiscal year 1999 budget request to Congress, "Without additional resources to continue procedural reforms, implement greater use of mediation, and invest in technology, the Commission is unlikely to make further progress toward its goal of reducing the average time it takes to resolve private sector complaints from over 9.4 months to 6 months by the end of 2000."[228] Consequently, the President has requested a substantial increase in funding for the EEOC as part of a general civil rights initiative. The President has requested that EEOC's budget be increased by 15 percent, to $279 million, in fiscal year 1999.[229] The budget request includes $13 million for an "enhanced mediation program," that would allow EEOC to hire "experienced and credible" mediators, both as employees and under contract.[230] The remainder of the budget increase would be for modernizing EEOC's "seriously antiquated information systems," further reducing the inventory of pending charges,[231] hiring more staff, doing outreach, and providing for basic administrative functions.[232] The budget increase is not targeted toward training (staff training and training for new technology) or increasing staff and filling vacancies.

The 15 percent increase in EEOC's FY 1999 budget has received support from Congress. However, House Speaker Newt Gingrich has placed restrictions on his support of the increase. According to the Speaker, six issues are obstacles to the budget increase. EEOC must commit to the following reforms:

- increased supervision of the investigations process;
- reducing the backlog of cases and the length of time it takes to process a case;
- appropriate allocation of resources between investigations and litigation;
- greater use of alternative dispute resolution;
- providing clarification of the criteria for litigation; and
- agreement not to use resources for employment testing.[233]

Acting Chairman Igasaki has stated that he is confident that EEOC can address these issues. Most of the issues have been resolved, and he is working with Congress to address the differences of opinion on employment testing. Acting Chairman Igasaki stated that employment testing may give EEOC the opportunity to see how discrimination might occur in hiring. However, it would not necessarily be used for litigation[234] and was part of a pilot program the results of which must be analyzed before EEOC can implement a program of testing.[235]

Staff Training on the ADA

Although EEOC investigators have received considerable training on the ADA, it is a complex civil rights law that may present particular challenges. Furthermore, because it is new, the ADA is a developing law, and issues can arise in a particular ADA case that were not covered in the ADA training. However, according to the Associate Legal Counsel, EEOC has provided more training on the ADA than on any other statute.[236] When the law was passed, EEOC began training its staff to prepare them to carry out their new responsibilities. In fiscal year 1990, initial training on the ADA was offered to all headquarters managers and supervisors, and videos of this training were shown to other staff. In fiscal year 1991, EEOC received funds for a "comprehensive training initiative," but these funds did not support training focused on the ADA.[237]

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[228] "Excerpts from Analytical Perspectives on Federal Budget for Fiscal Year 1999," released Feb. 2, 1998, as published in Bureau of National Affairs, *Daily Labor Report* (Feb. 3, 1998), p. E5.

[229] "Excerpts from Appendix to Federal Budget for Fiscal 1999," released Feb. 2, 1998, as published in Bureau of National Affairs, *Daily Labor Report* (Feb. 3, 1998), pp. E8–E10.

[230] "Excerpts from Analytical Perspectives on Federal Budget for Fiscal Year 1999," released Feb. 2, 1998, as published in Bureau of National Affairs, *Daily Labor Report* (Feb. 3, 1998), p. E5.

[231] Paul M. Igasaki, Acting Chairman, U.S. Equal Opportunity Commission, Statement before the U.S. House of Representatives, Subcommittee on Employer-Employee Relations Committee on Education and the Workforce, Mar. 3, 1998, p. 14.

[232] EEOC Comments, p. 4.

[233] *"The Future Direction of the Equal Employment Opportunity Commission": Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. 5 (Mar. 3, 1998) (statement of Newt Gingrich, Speaker of the House, U.S. House of Representatives).

[234] Igasaki interview, p. 3.

[235] "GOP Leadership Sets Out Conditions for Sharp Boost in EEOC Appropriations," *BNA's Employment Discrimination Report*, Bureau of National Affairs, Inc., Apr. 8, 1998, p. 438. The House Appropriations Committee July 15, 1998, approved an $18.5 million increase in the fiscal year 1999 budget for the EEOC to help reduce the agency's backlog of cases. The full Senate July 23, 1998, approved the fiscal year 1999 spending bill (S. 2260) by a vote of 99–0, which includes an $11.5 million increase in funds for the EEOC. A conference between the House and Senate will be required to resolve the differences between the two bills. *See* "$18.5 Million Hike in EEOC Budget Approved by House Appropriations Panel," BNA's EEOC Compliance Manual, Bureau of National Affairs, Inc., July 31, 1998, p. 111.

In fiscal year 1992, EEOC spent approximately $2 million training its staff, although the President's budget, approved by Congress, designated only $300,000 for staff training.[238] A 1-day training program was developed and delivered to 2,600 staff members in all the Commission's field offices, as well as to staff at the Office of Federal Contract Compliance Programs.[239] Most of the training was in video format, under the supervision of the Office of Legal Counsel.[240] In June 1992, EEOC conducted week-long training for 1,400 field managers, supervisors, investigators, and attorneys. EEOC also opened a training center for its employees.[241]

Training for EEOC staff for effective enforcement of the ADA has been ongoing. During fiscal year 1995, the former Office of Program Operations, in conjunction with the Office of General Counsel and the National Institute of Occupational Safety and Health, developed a training program on the ADA for EEOC attorneys and investigators, who in turn would deliver training to the field office staff. The EEOC viewed the training as "critical" for field office staff who analyze the "essential functions of a job" and reasonable accommodations under the ADA to resolve ADA charges.[242] In addition, the former Office of Program Operations coordinated with the Office of Legal Counsel and developed ADA case studies training for all field offices in fiscal year 1996. The training provided analysis and discussion of typical disability scenarios to aid investigators in proper development of such charges.[243]

EEOC's Legal Counsel said that the primary obstacle to training staff has been limited funding. Since the ADA was passed, the substantive training for EEOC staff has been almost exclusively on the ADA. However, according to the Associate Legal Counsel, many jurisdictional issues are still unresolved; thus, despite training, such issues may be difficult for investigators to address.[244] According to the Associate Legal Counsel, it is too soon to determine if a third wave of agencywide ADA training will be needed, but the agency probably will reassess ADA training needs in the future.[245]

Despite such challenges, EEOC has developed a broad array of training classes and manuals. For example, the "Priority Charge Handling Training Participants' Manual" provides information on analyzing evidence, prioritizing charges, interviewing, assessing credibility, and negotiating settlements.[246] In addition to providing role-playing scenarios and other exercises, this document provides information on EEOC procedures, requirements, and guidelines.[247] Similarly, the "ADA Case Study Trainer's Manual" provides case studies and legal analysis on a variety of ADA issues. This training manual covers reasonable accommodation and undue hardship, determining if a charging party has a psychiatric disability, disability-related questions and medical examinations, "regarded as" substantially limited in working, determining essential functions of a position, and direct threat.[248]

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[236] Mastroianni interview, p. 9.

[237] EEOC, "EEOC's Implementation of Title I of the Americans with Disabilities Act of 1990" (January 1993) (hereafter cited as EEOC, "EEOC's Implementation of Title I of the ADA") pp. 4–5.

[238] EEOC Comments, p. 4.

[239] EEOC, "EEOC's Implementation of Title I of the ADA," pp. 5–6.

[240] EEOC, *FYs 1991 and 1992 Annual Report*, p. 12.

[241] EEOC, "EEOC's Implementation of Title I of the ADA," pp. 5–6.

[242] EEOC, *FY 1995 Annual Report*, p. 12.

[243] Ibid., pp. 12–13.

[244] Casellas interview, p. 3.

[245] Mastroianni interview, p. 9.

[246] EEOC, "Priority Charge Handling Training Participants' Manual," November 1995 (hereafter cited as EEOC, "Priority Charge Handling Training Manual").

[247] *See, e.g.*, EEOC, "Priority Charge Handling Training Manual," app. A.

In addition to nationwide training, both headquarters and field offices have held their own training sessions. For example, the Legal Counsel stated that headquarters has created a training cooperative where every other month one office will take responsibility for developing a training course. The sessions are designed for lawyers, although all staff members are welcome to attend. Much of the training that has been done over the last 2 years has been in response to training plans and proposals for funding that have been submitted by various offices.[249]

The New York District Office also held its own training, in addition to taking the training provided by headquarters. Staff in the New York office prepared for the new priority charge handling procedures by practicing with hypothetical situations. In addition, the office contacted advocacy groups in the New York metropolitan area and asked them to provide training on how to communicate with individuals with disabilities.[250] Similarly, for 6 months before the ADA went into effect in 1992, the Dallas District Office had weekly training sessions at which representatives from disability organizations talked about issues with various disabilities and the typical types of accommodations. In addition to other ongoing informal training sessions, in 1997 the office held a number of 2-hour training sessions on different topics, including the ADA.[251] Other offices also have conducted informal training.[252]

The district director in Los Angeles said that staff training should be a continuous process. She recommends that training be tailored to individual investigators and address local issues, rather than be national in scope. The district director also noted that field offices should not have to rely on headquarters to provide training.[253]

Staff reactions to training have been mixed. An enforcement manager in the Charlotte District Office said that the training provided on the ADA has been outstanding and that staff was better prepared to enforce the ADA than other statutes.[254] Other staff agreed that staff training was sufficient, while some say it is still a priority, particularly in the field.[255] According to Acting Chairman Igasaki, headquarters staff is encouraged to provide informal training to field office staff when traveling to speak on the ADA.[256] Commissioner Miller stated that there are more courses available for lawyers, such as seminars offered at conferences, than there are for investigators.[257]

The Chicago district director summarized many of the shortcomings of the training that EEOC has provided on the ADA. He stated that the "train the trainer" approach to training, though less expensive, is insufficient compared to other forms of training. For this type of training to succeed, the trainers—supervisors and managers—need to have more intensive training.[258] The regional attorney in the Los Angeles District Office stated that continuing education is important. Although staff has had much classroom training, they will always need more. They also need more experience.[259] Similarly, the enforcement manager in the Los Angeles District Office said that staff will not master the ADA until various issues arise in the cases they are investigating. Every basis, issue, and situation cannot be covered in training.[260]

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[248] EEOC, "ADA Case Study Training Trainer's Manual," undated (hereafter cited as EEOC, "ADA Case Study Training Manual").

[249] Vargyas interview.

[250] Spencer Lewis, Director, Dallas District Office, EEOC, telephone interview, Apr. 9, 1998, pp. 2 and 4 (hereafter cited as Lewis interview).

[251] Bradley interview, p. 2.

[252] *See* Mabry-Thomas interview.

[253] Thelma Taylor, Director, Los Angeles District Office, EEOC, telephone interview, Apr. 17, 1998 (hereafter cited as Taylor interview).

[254] Michael Witlow, Enforcement Manager, Charlotte District Office, EEOC, telephone interview, Apr. 14, 1998 (hereafter cited as Witlow interview).

[255] *See* Viramontes interview, p. 3; Dubey interview, pp. 1–2; Choate interview, p. 6; Drane interview, p. 2; Jim Wallace, Enforcement Supervisor, Dallas District Office, EEOC, telephone interview, Apr. 14, 1998, p. 3 (hereafter referred to as Wallace interview).

[256] Igasaki interview p. 2.

[257] Miller interview, p.6.

[258] John Rowe, District Director, Chicago District Office, EEOC, telephone interview, Apr. 16, 1998 (hereafter cited as Rowe interview).

[259] Thomason interview.

In 1998 a pilot training project will begin at four EEOC district offices (Atlanta, Los Angeles, Milwaukee, and Philadelphia) under a joint program between EEOC and the Equal Employment Opportunity Committee of the American Bar Association. These district offices will receive training based on the needs of staff in each office.[261] According to Commissioner Miller, who spearheaded this initiative, under this program, the American Bar Association liaison representatives will design the training programs in conjunction with district directors and regional attorneys to learn about the particular training needs of the different field offices, since needs may differ across offices.

Commissioner Miller explained that the advantages of the training are that it is targeted, individual, and free. The goal is to create a collaborative program that occurs on a regular basis. The training will be designed collectively by representatives of management, employees, and unions, so that it will include all perspectives. Over time, EEOC field offices can share what they have learned from the training with other offices. Commissioner Miller said that another benefit of the program will be to give the ABA a real investment in the progress and success of EEOC. The program is expected to expand to other offices at the beginning of fiscal year 1999.[262]

According to the March 1998 report of the Priority Charge Handling Task Force and the Litigation Task Force, EEOC's training needs exceed its available resources. Thus, the agency must be creative in identifying training opportunities for its staff. Because the fiscal year 1999 budget calls for improvements in technology and an expansion of the alternative dispute resolution program, staff training will be a crucial issue.[263]

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[260] Viramontes interview.

[261] "Private Attorneys to Train EEOC Staff in New Volunteer Project with ABA Panel," *Daily Labor Report*, no. 60 (Mar. 30, 1998), p. C–1; Miller interview, p. 6.

[262] Miller interview, p. 6.

[263] EEOC, *March 1998 Task Force Report*, p. 25.

4 Assessment of EEOC's Rulemaking and Policy Development

The Equal Employment Opportunity Commission's implementation and enforcement program for the Americans with Disabilities Act emphasizes policy guidance and litigation.[1] EEOC does rulemaking and advances policy positions in enforcement guidance documents, cases it litigates, and *amicus curiae* briefs. Through these mechanisms, EEOC has sought to achieve a number of goals: to meet Congress' requirements for implementing the ADA, to influence the development of the law, and to raise awareness and understanding about the ADA and the rights and responsibilities it establishes for employers and employees.

In accord with Congress' instructions in the ADA, EEOC issued substantive title I regulations.[2] EEOC also issued detailed interpretive guidance along with its regulations.[3] Finally, EEOC issued policy or enforcement guidance on key issues under the ADA, such as defining the term "disability."[4] How EEOC develops regulations and policies, their substance on key statutory terms and issues, and the different ways in which EEOC officials, the courts, advocacy groups, and others have viewed EEOC's policies all enter into an assessment of the agency's effectiveness in implementing and ensuring compliance with the law.

Title I Rulemaking and Policy Development

In developing regulations and policies and in its litigation, EEOC seeks in part to guide the development of the ADA and the other laws it enforces.[5] One of EEOC's most important goals, according to its National Enforcement Plan, is to find cases that have the potential of promoting the development of law supporting the antidiscrimination purposes of the statutes the agency enforces.[6] To advance its position, EEOC undertakes cases that present unresolved issues of statutory interpretation or involve legal issues where there is a conflict among the Federal circuits. Similarly, EEOC issues policy guidance with the agency's interpretation of complex provisions of law to facilitate compliance with the ADA and other statutes it enforces.[7]

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[1] Although litigation is an important means through which EEOC advances its ADA policy positions, this chapter focuses solely on policy as it has been enunciated in regulations and policy guidance. Chap. 6 addresses EEOC's litigation activities from a procedural perspective.

[2] 29 C.F.R. § 1630 (1997).

[3] *See id.* pt. 1630 app. (1997).

[4] *See* U.S. Equal Employment Opportunity Commission (EEOC), "Section 902—Definition of the Term 'Disability'," Mar. 15, 1995 (hereafter cited as EEOC, "Definition of the Term 'Disability'").

[5] EEOC, "National Enforcement Plan," February 1996, p. 2 (stating "the Commission [EEOC] must use its limited resources more strategically to deter workplace discrimination, guide the development of the law, resolve disputes, and promote a work environment in which employment decisions are made on the basis of abilities, not on the basis of prejudice, stereotype and bigotry"); EEOC, "Strategic Plan: 1997–2002," OMB Review Copy, Aug. 18, 1997, pp. 29–30 (stating that "the agency [EEOC] has brought many cases which had been instrumental in the development of the law") (hereafter cited as EEOC, "Strategic Plan").

[6] EEOC, "National Enforcement Plan," p. 5.

[7] EEOC, "Strategic Plan," pp. 17–18.

Rulemaking

Under the ADA, EEOC has the authority to engage in "substantive rulemaking."[8] The ADA required EEOC to issue final regulations implementing the employment provisions of the act within 1 year of its passage.[9] Accordingly, EEOC issued its regulations implementing the employment provisions of the ADA on July 26, 1991.[10] EEOC also issued its regulations implementing ADA recordkeeping and reporting requirements in a timely fashion.[11] Congress also required EEOC and other agencies with enforcement authority for employment nondiscrimination requirements under the ADA and the Rehabilitation Act to establish coordination procedures in their regulations to avoid duplication of effort and inconsistent or conflicting standards in processing complaints filed under both the ADA and the Rehabilitation Act.[12] EEOC published such regulations in the Federal Register in August 1994.[13]

In completing the rulemaking required by Congress in the ADA, EEOC actively solicited and considered public comment.[14] On August 1, 1990, a few days after the ADA was signed into law, EEOC published an advance notice of proposed rulemaking informing the public that the agency had begun developing substantive regulations under title I of the ADA.[15] With this notice, EEOC invited comment from interested groups and individuals. The comment period lasted until August 31, 1990. EEOC received 138 comments from various disability rights groups, employer groups, and individuals. In addition, EEOC solicited comments through 62 meetings held by EEOC field offices throughout the country in which more than 2,400 representatives from disability rights organizations and employer groups participated.[16]

During the next 11 months, EEOC staff drafted proposed regulations,[17] reviewed public comments on the regulations, and finalized the regulations for publication in the Federal Register. On February 28, 1991, EEOC published its notice of proposed rulemaking for title I.[18] The comment period ended on April 29, 1991,[19] and EEOC received 697 comments from interested groups and individuals.[20]

Comments were provided by private citizens (with and without disabilities), some of whom praised the proposed rules and some of whom thought they were not sufficient; attorneys seeking clarification of certain phrases and terminology; and physicians disturbed that the regulations neglected to indicate that only medical experts were qualified to identify disabled individuals. In addition, various business representatives addressed health insurance and workers compensation issues.[21] Many of these comments have resonance today, nearly 8 years later, because they address issues that remain controversial. For example, small business entrepreneurs expressed concern about the administrative and financial impracticalities of the regulations; contractors and executives of construction companies argued that compliance with the regulations would cause safety hazards at work sites; and other employers stressed that accommodating individuals with particular cognitive impairments would hinder productivity. In addition, some State and local police and fire departments claimed that physically disabled individuals would not have the proper skills to "protect the streets" and promote public safety. Further, various disability advocacy groups, especially those representing mentally ill individuals, were critical of how such terms as "major life activity" and "direct threat" were defined. Some public and independent human services organizations noted that although the ADA protects individuals with organic brain disorders, the title I regulations lacked references to similarly disabled groups, such as victims of traumatic brain injuries.[22]

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[8] EEOC, "Policy Guidance: Provisions of the Americans with Disabilities Act of 1990: Summary of the Act and Responsibilities of the EEOC in Enforcing the Act's Prohibitions Against Discrimination in Employment on the Basis of Disability," (EEOC Notice 915-055), Aug. 14, 1990, p. 10 (hereafter cited as EEOC, "Policy Guidance: Provisions of the ADA").

[9] *See* 42 U.S.C. § 12116 (1994). *See also* EEOC, *Fiscal Year 1990 Annual Report*, p. 8 (hereafter cited as EEOC, *FY 1990 Annual Report*). Individuals seeking to file ADA charges before July 26, 1992 were referred to an appropriate Federal or State agency. EEOC, "Policy Guidance: Provisions of the ADA," p. 10.

[10] *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35726 (1991) (codified at 29 C.F.R. § 1630 (1997)).

[11] *See* 29 C.F.R. § 1602 (1997).

[12] 42 U.S.C. § 12117(b) (1994).

[13] *See* 29 C.F.R. pt. 1640 (1997).

[14] *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (1991).

[15] *Id.* (citing Advance Notice of Proposed Rulemaking, 55 Fed. Reg. 31,192 (1990)).

[16] *Id.*

[17] Naomi Levin, Special Assistant to Commissioner Jones, EEOC, interview in Washington, DC, Apr. 1, 1998, p. 2 (hereafter cited as Levin interview). In explaining how staff performed the work of drafting the original regulations, Ms. Levin said that only two attorneys were assigned the task of actually writing, herself and another attorney. They began their work by putting each section of the law together with all legislative history references to that section and the relevant parts of section 504 of the Rehabilitation Act in a notebook, which they used as a reference for writing the regulations, in keeping with Congress's intent. Ibid.

[18] *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. at 35,726 (citing Notice of Proposed Rulemaking, 56 Fed. Reg. 8,578 (1991)). *See also* Levin interview, p. 2.

[19] Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. at 35,726.

[20] *Id.*

[21] *See* 17-volume compendium of Comments on Proposed Rulemaking, 56 Fed. Reg. 8578 (Feb. 28, 1991), maintained in EEOC public library (hereafter cited as Compendium of Comments).

Comments from individuals with disabilities included those of an individual with multiple sclerosis stating that the absence of strong guidelines and criteria from EEOC would "dilute the ADA."[23] A man in his twenties (using mental illness as an example) noted that some individuals "regarded as having a disability" are misdiagnosed by a physician, yet are "treated" as a person with a disability by peers and coworkers. The writer urged the EEOC to mention in the definition of "qualified individual with a disability" that caution should be given to "regarding an individual as disabled" because he or she may have not been properly diagnosed.[24]

EEOC did not address these concerns specifically in its final rule. However, in the interpretive guidance accompanying the rule, EEOC stated: "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[25] In addition, the regulations state that having a record of a disability includes having been "misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."[26] The interpretive guidance further explains Congress' consideration of the possibility of misdiagnosis and the second part of the definition provides:

> that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that erroneous classification.[27]

EEOC also received comments from many others. Comments on reasonable accommodation, the "interactive" relationship, and undue hardship particularly addressed ADA issues that remain unresolved today. For example, an attorney with a Santa Barbara, California, firm addressed several problems with the title I regulations and offered solutions for clarification. The attorney pointed out that in the proposed rules, section 1630.9(a) requires that employers make reasonable accommodations to *known* limitations and section 1630.2 (o)(3) suggests that employers discuss "reasonable accommodations" with a disabled applicant or employee. The attorney was particularly concerned about the proposed rule's section 1630.13(b), which prohibits employers from inquiring about disabilities. From the attorney's perspective, the proposed regulations indicated that only those employees or applicants who initiate the discussion about a disability must be accommodated. The attorney suggested that the final title I regulations should address whether an employer may inquire if a reasonable accommodation is necessary, and if so, the nature and scope of the accommodation. The attorney claimed that with this provision, the optimal accommodation for the employee or applicant can be determined; and the employer can assess the "burden of the requirement."[28]

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[22] *See generally* Compendium of Comments.

[23] Jean Towes, Spokane, WA, letter to Frances M. Hart, Executive Officer, EEOC, Apr. 10, 1991.

[24] Unidentified writer, letter to Frances M. Hart, Executive Officer, EEOC, Apr. 9, 1991.

[25] *See* 29 C.F.R. pt. 1630 § 1630.2(j) (1997).

[26] *See id.* § 1630.2(k).

[27] *Id.* pt. 1630 § 1630.2(k).

The regulations do not explicitly state that an employer may ask whether an employee requires reasonable accommodation. However, they do state than any covered entity "may make inquiries into the ability of an employee to perform job-related functions."[29] Moreover, the regulations state that "it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation."[30]

This language seems to suggest that an employer can begin to address the problem, but, as this attorney suggested, the employer is not responsible for that about which he has not been informed. However, the regulations also state that it is unlawful for a covered entity to deny employment opportunities based on the need to make reasonable accommodation.[31] Since this provision does not qualify the term "physical or mental impairments" with the word "known," could employers be held liable for not providing reasonable accommodation to employees whose disabilities are not known? This confusion is just one example of the unclear guidance relating to reasonable accommodation that remains a problem today.

This attorney noted other concerns that continue to be important today. For example, he suggested that EEOC make changes regarding the concept of "undue hardship." He mentioned that sections 1630.2(p) and 1630.9(a) require an economic analysis of the effect of the cost of *a* particular reasonable accommodation, based on the covered entity's financial resources. The attorney noted that this regulation was not sufficient, because it did not recognize the effects of the costs of multiple and successive accommodations that could be incumbent on the employer. To elaborate his point, the attorney noted that providing a qualified interpreter for one disabled employee may not have a burdensome economic impact on a small business entity. However, the cumulative accommodation costs for subsequent employees could be an undue financial and administrative burden, even though each separate accommodation would not be so. To offer a solution, the attorney suggested that the title I regulations clarify that the analysis for determining the presence of an undue burden should include a calculus of the "total cumulative burden" on the employer and not just the artificially isolated costs and requirements for an individual employee or applicant.[32] However, these changes were not made. The "total cumulative burden" on the employer is not addressed in either the rules or the interpretive guidance.

The Santa Barbara attorney also addressed the issue of "essential functions" of a job. He wrote that sections 1630.2(m) and (n) in the proposed regulations describe the essential functions of a job in terms of job "duties," but they explicitly focus on the active or mechanical operations of a given position. The attorney argued that these proposed rules neglected to address the "less tangible job requirements," such as the need to work compatibly in a team environment. The attorney mentioned that individuals with protected disabilities, such as mental or psychological disorders, can have involuntary emotional outbursts which may not directly disrupt the active performance of the disabled employee, but would nevertheless severely hinder team members in the same work environment. The attorney stressed that the final title I regulations should make explicit that "essential functions" can include more abstract job requirements, such as the ability to (a) work effectively and constructively on a team or (b) avoid disruptive behaviors that directly and significantly affect the performance of coworkers.[33] The final title I regulations did not include the proposed changes. The definition of "essential function" does not refer to "abstract job requirements" or "less tangible job requirements."[34]

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[28] J. Terry Schwartz, attorney, Price, Postel, and Parma, Santa Barbara, CA, letter to Frances M. Hart, Executive Officer, EEOC, Mar. 27, 1991 (hereafter referred to as Schwartz letter).

[29] 29 C.F.R. § 1630.14(c) (1997).

[30] *Id.* § 1630.2 (o)(3).

[31] *See id.* § 1630.9(b).

[32] Schwartz letter.

[33] Ibid.

An attorney with a Tennessee law firm also commented.[35] Overall, this attorney expressed concerns about the clarity and precision of the language of the statute and its regulations, especially with regard to key terms. These concerns remain among the most significant ones today.[36] This attorney was specifically concerned about the potential difficulties for employers to comply with vague legal standards, such as providing "reasonable accommodations." He added that the ADA is replete with many definitional and application problems and stated that, without more explicit guidelines (from EEOC), it is difficult for employers to determine, with any certainty, the lawfulness of their choices and decisions. As a consequence, employers could potentially be sued and forced to defend their actions without having any way of knowing whether those actions violated a civil rights law.

Other comments came from presidents of credit unions. The first pointed out that many credit union staff positions require employees to handle or have access to cash or other negotiable instruments and these employees are bonded to protect against potential theft, embezzlement, or related misconduct. Individuals with documented histories of illegal drug abuse are likely to not be "bondable," he said, regardless of whether they had completed rehabilitation programs. If the ADA, as it appeared, were to override the current policy of hiring only bondable individuals for sensitive positions, the president wrote, then compliance with the ADA could expose the credit union to losses, damages, and potential lawsuits. The president said that credit unions would need assurances that a legal defense based on compliance with the ADA would protect them from these and other legal liabilities. He also stressed that financial institutions should be exempt from hiring former illegal drug abusers into "positions of trust and fiduciary responsibility."[37] This suggestion, however, contradicted the ADA itself, which explicitly protects former illegal drug users. In accord with the statute, the regulations state that an individual who has successfully completed a drug rehabilitation program and is no longer engaging in the illegal use of drugs can be considered a "qualified individual with a disability" under section 1630.3.[38]

Another credit union president stressed several areas in the proposed regulations seemed impractical, unrealistically burdensome, or "too vague for any employer," regardless of commitment to compliance with the ADA. For instance, she said that the regulations did not specify who determines that a needed accommodation causes "undue hardship" to an employer. She also said the term "undue hardship" was too subjective. She added that because her firm tends to rotate employees on a periodic basis, the credit union could be forced to physically renovate and purchase equipment for more than 10 locations to accommodate only one "qualified individual with a disability." This credit union president was also concerned that the regulations did not clarify what would happen (to a covered employer) if a "qualified individual with a disability" accepted an accommodation, later claimed that it was not sufficient, and demanded a remedy that caused an employer "undue hardship."[39]

At least two individuals, a human resources manager and an attorney, argued that the ADA should address the problem of absences related to a disability. The human resources manager, employed by a highway contractor, pointed out that the company's work is done on a competitive bid basis with tight completion schedules, and excessive absences by *any* employee are a serious problem, especially due to the seasonal nature of the company's work.[40] The attorney from San Francisco suggested that the definitions and discussions of "reasonable accommodations" should include EEOC's views on employers' tolerance of "excessive absenteeism," particularly with respect to chronic illnesses. The attorney said that excessive absenteeism is the most difficult problem in "managing performance" with respect to certain disabilities, such as lupus, HIV, and Epstein-Barr, in the workplace.[41] However, "excessive absenteeism" is not considered in the definition or discussion of "reasonable accommodation."[42] "Excessive absence" is not discussed in depth in the title I rules outside of the guidance of section 1630.5: "It would also be a violation of this part to deny employment to an applicant or employee with a disability. . .based on generalized assumptions about the absenteeism rate of an individual with such a disability."[43] However, more recently, regular presence at work has been viewed as an essential function of any job. This is another example of a certain tension between EEOC guidelines and other interpretations of the ADA that continues today.

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[34] 29 C.F.R. § 1630.2(n).

[35] Edward Snyder, attorney, Witt, Gaither, and Whitaker, Chattanooga, TN, letter to Frances M. Hart, Executive Officer, EEOC, Mar. 25, 1991 (hereafter cited as Snyder letter).

[36] *See* discussion below, this chapter.

[37] President, Andrews Federal Credit Union, Suitland, MD, letter to Frances M. Hart, Executive Officer, EEOC, Apr. 2, 1991 (hereafter cited as Andrews Federal Credit Union letter).

[38] 29 C.F.R. § 1630.3.

[39] Jean M. Yokum, president, Langley Federal Credit Union, Hampton, VA, letter to Frances M. Hart, Executive Officer, EEOC, Mar. 28, 1991.

[40] James L. Hoban III, Human Resources Manager, James Julian, Inc., Wilmington, DE, letter to Frances M. Hart, Executive Officer, EEOC, Mar. 15, 1991.

A number of State, city, and county mental health and human services departments and related nonprofit associations commented that the proposed title I regulations tended to reflect barriers to understanding mental illness. For instance, the public policy chairperson of the Mental Health Association of Knox County, Tennessee, observed that her organization worked hard to help pass the ADA and was concerned that mentally ill individuals benefit from the protections afforded by the law. She stated that in general, examples, interpretations, and explanatory notes included in the body of the ADA regulations should give additional attention to individuals with mental illness. Individuals with mental illnesses were given additional attention to the extent that certain examples were added that focus on mental disabilities.

In addition, she acknowledged that mental illness may impart "substantial limitations" on an individual's ability to perform a specific job. However, she indicated that the definition of "major life activities" pertains more to individuals with physical disabilities and offers limited applicability to persons with a mental disability. Thus, she recommended that EEOC expand the definition to include activities such as reasoning, concentrating, socializing, and communicating. Although the expansion was not made, the interpretive guidance on section 1630.2(I) defines major life activities as "those basic activities that the average person in the general population can perform with little or no difficulty."[44] The activities that the chairperson suggested fall under this category.

The chairperson also had concerns with respect to EEOC's expansion (in the proposed regulations) of the definition for "direct threat" to include "risk to the individual." She said that a particular problem with this is that a "direct threat" may be interpreted by an employer based on stereotypes of mentally ill individuals. She suggested that EEOC modify the title I regulation to state that "risk" to self and others should be based on an individual's current condition rather than mere speculation about the future course of a disability, or a more generalized fear of a disability. The modification was not made, but her concern is addressed in the interpretive guidance on section 1630.2(r). This provision states that in determining whether the qualified individual with a disability poses a direct threat, the employer must consider the risk and harm that would result from hiring the applicant. These considerations, however, "must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature of the particular disability."[45]

Finally the chairperson suggested that EEOC clarify in the body of the regulations that an "undue hardship" should be based on the administrative or financial costs of providing an accommodation, and not based on the hardship of accommodating the fears and prejudices other workers hold about disabilities.[46] However, the wording remains ambiguous. "The concept of undue hardship," the interpretive guidance on section 1630.2(p) states, "is not limited to financial difficulty. [It] refers to any accommodation that. . .would fundamentally alter the nature or operation of the business."[47] Several other letters from State and local mental health associations expressed the same concerns.[48]

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[41] Charles J. Nau, Attorney, San Francisco, CA, letter to Frances M. Hart, Executive Officer, EEOC, Apr. 7, 1991.

[42] 29 C.F.R. § 1630.2(o).

[43] *Id.* § 1630.5.

[44] *Id.* § 1630.2(i).

[45] *Id.* § 1630.2(p).

[46] Lofaro letter.

Various State and local organizations representing individuals with epilepsy responded to the proposed title I regulations. For instance, the president of the Coelho Jobs Center was concerned about individuals with epilepsy being required to disclose their condition when seeking employment. Although the Jobs Center acknowledged that the title I regulations prohibit employers from requiring applicants to have a medical examination to determine the presence of a disability, it was concerned that job applications would continue to ask questions about disabilities. Thus, the Jobs Center urged EEOC to clarify in the regulations what employers can and cannot ask on a job application.[49] Regulatory provisions responding to this concern can be found in sections 1630.13 and 1630.14.[50]

EEOC considered, analyzed, and in some cases incorporated concerns identified in the comments in the development of its final title I rule,[51] published in the Federal Register on July 26, 1991, 1 year after the passage of the ADA.[52] Generally, EEOC's substantive title I regulations clarify and elaborate on the provisions of the statute. They provide specific criteria identifying standards to define more clearly the meaning of such terms as "reasonable accommodation," "undue hardship," and "determine whether undue hardship or direct threat exist." EEOC based its development of ADA regulations and policy guidance on the ADA statute, congressional intent as expressed in the ADA's legislative history, significant court cases, and the provisions and regulations of sections 501, 503, and 504 of the Rehabilitation Act of 1973.[53] In general, the legislative history and text of the ADA largely were based on section 504 law.[54] As a result, the ADA's policy positions on disabilities issues largely were the same as those in the section 504 regulations and the body of section 504 caselaw that had grown up since its passage in 1973.[55]

Policy and Enforcement Guidance

EEOC provides its staff with policy or enforcement guidance on the various civil rights laws for which the agency has enforcement responsibilities.[56] The enforcement guidance helps EEOC staff in investigating and evaluating claims of discrimination, in interpreting and applying significant new court decisions and legislation, and in evaluating evidence in cases raising issues addressed in the guidance. The guidance also informs the public of EEOC's position on various subjects.[57] In addition, the legal interpretations that EEOC advances in its policy guidance play an important role in shaping nearly every aspect of the agency's implementation and enforcement efforts.

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[47] 29 C.F.R. § 1630.2(p).

[48] *See, e.g.*, Jean M. Jones, President, Mental Health Association of Georgia, Inc., Decatur, GA, letter to Frances M. Hart, Executive Officer, EEOC, and Jane Van Sant, Executive Director, Transitional Living Consortium, Kansas City, MO, letter to Frances M. Hart, Executive Officer, EEOC, Apr. 10, 1991.

[49] President, Coelho Jobs Center, Epilepsy Foundation of North Central Illinois, Rockford, IL, letter to Frances M. Hart, Executive Officer, undated. *See also* Carolyn Smith, Executive Director, Dallas Epilepsy Association, Dallas, TX, letter to Frances M. Hart, Executive Officer, EEOC, Apr. 10, 1991; and Alexander Younger, President, Epilepsy Foundation for the National Capital Area, Washington, DC, letter to Frances M. Hart, Executive Officer, EEOC, Apr. 11, 1991.

[50] 29 C.F.R. § 1630.13; 29 C.F.R. § 1630.14.

[51] *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (1991). *See also* Levin interview, pp. 2–3. In describing how EEOC undertook this process, Ms. Levin stated that EEOC assigned several staff members, mainly attorneys, with expertise in specific issues to respond to the comments. Using limited computer systems, they created indices and key words and phrases to access specific issues and write summaries for each one. Relying on this system, EEOC was able to meet Congress' deadline for completion of the title I rules.

[52] Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. at 35,726 (1991).

[53] Sections 501, 503, and 504 of the Rehabilitation Act are codified at 29 U.S.C. §§ 791, 793–794 (1994). *See also* Levin interview, p. 2.

[54] Levin interview, p. 2.

[55] Ibid.

[56] These include the Equal Pay Act of 1963, 29 U.S.C. §§ 201 note, 206, 206 note (1994); title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (1994); as well as title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–12117 (1994).

[57] EEOC, *Annual Report 1993*, p. 12 (hereafter cited as EEOC, *FY 1993 Annual Report*).

EEOC's ADA policy and enforcement guidance may be helpful to any number of people, including people with disabilities, employers, management and plaintiffs' attorneys, and disability advocacy groups. However, these policy documents are intended primarily to provide guidance and direction to EEOC's investigative and legal staff.

Policy and Enforcement Guidance Development

In developing its policy or enforcement guidance on title I, EEOC has more latitude to choose what issues it will address and when the guidance will be published than it had in developing title I regulations, because it is not operating under a timeframe determined by Congress. Since August 1990, EEOC has issued numerous policy guidance or enforcement guidance documents relating to the ADA. Generally, it has chosen issues on which to focus based on its stated reasons for undertaking policy development in its Strategic Plan, namely, to offer the agency's interpretation of complex provisions of the law and to facilitate compliance with the law.

EEOC's ADA policy and enforcement guidance is developed by the ADA Policy Division in the Office of Legal Counsel for approval by EEOC's Commissioners. Before 1997, EEOC did not have a formal mechanism for policy development. In early 1997, EEOC formed a policy development committee and thus established a formal policy development mechanism.[58] The committee consists of representatives of each of the Commissioners, the Legal Counsel, the Associate Legal Counsel, and representatives from the Office of General Counsel, the Office of Field Programs, and the Office of Federal Operations. The committee meets once a month. The Associate Legal Counsel explained that if the Office of Legal Counsel is considering developing policy guidance on an ADA issue, the Legal Counsel and Associate Legal Counsel will present it at the meeting.[59]

In interview statements, EEOC's Associate Legal Counsel noted that the Office of Legal Counsel assesses which issues it will present to EEOC's Commissioners for policy guidance development based on a combination of factors, both formal and informal.[60] For example, staff do a lot of public speaking and receive much information from employers, human resources people, and disability rights advocates who call and write the agency.[61] The Associate Legal Counsel said that the classic example of the Office of Legal Counsel's ADA policy development is the guidance on psychiatric disabilities.[62] She noted that staff has received many questions on this issue since EEOC began enforcing the ADA.[63] In addition to information provided by stakeholders, the Office of Legal Counsel also gets input from EEOC's field offices. Investigators and attorneys in the field tell them about issues they see repeatedly.[64] Also, in some instances, the Commissioners suggest issues on which they want guidance.[65]

The Legal Counsel described the process the group goes through in developing policy as "interactive." She said that the group discusses various issues and determines if they need to be addressed. She added that the entire process of generating policy is very lengthy. After it is prepared in the Office of Legal Counsel, there is an interoffice review process, and then the policy is reviewed by the Commissioners, and changes are made.[66]

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[58] *See* Peggy R. Mastroianni, Associate Legal Counsel, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 6, 1998, p. 2 (hereafter cited as Mastroianni interview). Before the creation of the Policy Development Committee in 1997, the EEOC had no committee for policy development. However, EEOC always has had formal policy development procedures. Thus, policy documents are originally drafted by attorneys in the Office of Legal Counsel. After approval by the Legal Counsel, they are circulated to the major offices within the EEOC for comment. After these comments are reconciled, policy documents go to the Commissioners for comment, revision, and a vote. With the creation of the Policy Development Committee, proposed policy development options are now presented to the Committee at the very beginning of the process. *See* Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights (USCCR), July 9, 1998, Comments of the EEOC, p. 6 (hereafter cited as EEOC Comments).

[59] Mastroianni interview, p. 2.

[60] Ibid., p. 1.

[61] Ibid., p. 2.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Ibid.

Some disability advocates have criticized EEOC for not having a formal mechanism in place for advocacy groups to raise issues or concerns with EEOC on specific issues *before* policy guidance is issued.[67] The Legal Counsel and the Associate Legal Counsel confirmed that, with the exception of very limited circulation within the Federal Government, draft policy guidance is not circulated outside of the agency and EEOC does not provide an opportunity for formal notice and comment for anything except its regulations.[68] The Associate Legal Counsel said that if EEOC had a formal notice and comment for policy or enforcement guidance, it would not have been able to issue as much guidance. However, both the Legal Counsel and the Associate Legal Counsel noted that Office of Legal Counsel staff includes input from stakeholders throughout the process.[69] According to the Associate Legal Counsel, EEOC "floats all sorts of ideas" informally in meetings with outside groups and sometimes holds informal meetings with stakeholders to discuss ideas. EEOC also accepts and considers comments from anyone who writes the agency. She indicated that EEOC does not actively solicit written comments on policy and enforcement guidance, because if EEOC issued a letter asking for comment, it would become formal. She said that EEOC cannot just write a letter to some people because it would be nearly impossible to include all interested groups. To do so would require publishing the request in the Federal Register, which is the equivalent of providing the full formal notice and comment of the regulatory process.[70]

EEOC Commissioner Paul Steven Miller reiterated that, in developing its policy or enforcement guidance, EEOC does not have a formalized process for notice and comment before a given policy statement or guidance is issued. EEOC does not circulate a draft guidance before it is voted on, because this would be too cumbersome.[71] He said that what EEOC does do quite extensively is hold conversations with all stakeholders, organized labor, employers, and advocacy groups.[72] As the Commissioners travel around the country, they gain a lot of information. EEOC encourages written comments addressing the issues covered in its proposed policy or enforcement guidance, although it does not circulate them.[73]

Title I Policy and Enforcement Guidance

Generally, each of the policy and enforcement guidance documents published thus far has addressed a discrete area of ADA law. EEOC may issue the guidance to clarify and explain its position on a specific issue. EEOC may use the guidance to reiterate a position it already has taken in litigation. It also may issue guidance on an issue relating to title I implementation and enforcement that it never has addressed before.

Shortly after enactment of the ADA, in August 1990, EEOC published an initial policy guidance on the basic provisions of the ADA.[74] The next ADA enforcement guidance EEOC published was its interim guidance on health insurance, issued in 1993.[75] EEOC's Associate Legal Counsel stated that EEOC published its interim health insurance guidance because it was receiving many charges on that issue.[76] The next guidance was on the definition of disability,[77] which was a critical issue from the very beginning.[78] After that, EEOC issued guidance on preemployment inquiries and examinations.[79] According to the Associate Legal Counsel, it was important to issue guidance on that issue right away, because it was new—no similar provision existed in older civil rights statutes.[80]

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[66] Ellen Vargyas, Legal Counsel, EEOC, interview in Washington, DC, Apr. 7, 1998, pp. 2–3 (hereafter cited as Vargyas interview).

[67] *See* Linda Priebe, Senior Attorney, David L. Bazelon Center for Health Law, interview in Washington, DC, Dec. 16, 1997, p. 4 (hereafter cited as Priebe interview).

[68] Vargyas interview, p. 2; Mastroianni interview, p. 3.

[69] *See* ibid.

[70] Mastroianni interview, p. 3.

[71] Paul Stephen Miller, Commissioner, EEOC, Remarks at Government Training Institute's National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act, Jan. 12–13 1998, Arlington, VA.

[72] Ibid.

[73] Ibid.

[74] EEOC, "Policy Guidance: Provisions of the Americans with Disabilities Act of 1990: Summary of the Act and Responsibilities of the EEOC in Enforcing the Act's Prohibitions Against Discrimination in Employment on the Basis of Disability," (EEOC Notice 915–0055), Aug. 14, 1990, p. 11 (hereafter cited as EEOC, "Policy Guidance: Provisions of the ADA").

[75] EEOC, "Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-based Distinctions in Employer Provided Health Insurance" (EEOC Notice 915.002), June 8, 1993 (hereafter cited as EEOC "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance).

EEOC published a noteworthy enforcement guidance document on the ADA and psychiatric disabilities in March 1997.[81] This guidance includes a legal discussion and analysis, and also addresses clinical issues, such as separating mere traits from a diagnosis of a personality disorder and determining when traits such as poor ability to concentrate or think become signs of an impairment.

EEOC's Research and Analytic Services unit in the Office of General Counsel employs social scientists, economists, psychologists, and other subject matter experts. Apparently the Office of Legal Counsel and its ADA Policy Division have had little contact with this office. Further, EEOC does not have inhouse medical experts in any unit. Should EEOC do a guidance document on another specific kind of disability or anything outside the purely legal topics it mainly has addressed to date, the ADA Policy Division may be able to benefit significantly from using nonlegal experts. The head of the ADA Policy Division recently stated that in preparing future policy guidance, he would be interested in using the expertise of anybody within the agency who could be helpful.[82]

According to the Associate Legal Counsel, EEOC's focus in developing enforcement guidance has been on addressing the most significant ADA issues. She noted that EEOC does not publish and the Office of Legal Counsel does not draft enforcement guidance on every unresolved ADA issue causing conflict among the courts.[83] This is because EEOC's Office of General Counsel does litigation and *amicus* activity (approved by the Commissioners) that advance EEOC's position on these issues. In addition, the Associate Legal Counsel said that with smaller ADA issues or issues of lesser significance, "enforcement guidance is not the way to go, because then you have lots of tiny little enforcement guidances."[84] However, the Office of Legal Counsel in the past published 1-page documents on discrete topics relating to the ADA. For example, on May 11, 1995, EEOC published a 1-page "guidance memorandum" on disability plans under the ADA. On July 17, 1995, EEOC issued a "policy statement" on alternative dispute resolution. These brief guidance documents address specific ADA-related topics without the indepth analysis of the much lengthier ADA enforcement guidance documents. They, nonetheless, are an effective way to set out or clarify EEOC's position on specific ADA topics or issues, particularly issues over which the courts are in conflict.

In 1990 EEOC stated that during the 2-year period between the enactment and the effective date of the act, it would "develop several additional policy documents."[85] These were to include compliance manual sections on the "Theories of Discrimination" under the ADA, the "Definition of Disability," "Definition of Qualified Individual with a Disability," and "Reasonable Accommodation and Undue Hardship," as well as policy guidance on "Preemployment Inquiries." EEOC has not published the promised enforcement guidance on ADA theories of discrimination, the definition of qualified individual with a disability, and policy discussion on reasonable accommodation and undue hardship. These last three, particularly reasonable accommodation and undue hardship, lie at the center of some of the most heavily disputed issues that have arisen since the passage of the ADA.[86]

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[76] Mastroianni interview, p. 2.

[77] EEOC, "Definition of the Term 'Disability.'"

[78] Mastroianni interview, p. 2.

[79] EEOC, "Americans with Disabilities Act Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," Oct. 10, 1995 (hereafter cited as EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations").

[80] Mastroianni interview, p. 2.

[81] *See* EEOC, "EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities," (EEOC Notice 915.002), Mar. 25, 1997 (hereafter cited as EEOC, "Enforcement Guidance on ADA and Psychiatric Disabilities").

[82] Christopher Kuczynski, Director, Americans with Disabilities Act Division, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 7, 1998, p. 3 (hereafter cited as Kuczynski interview).

[83] Mastroianni interview, p. 4.

[84] Ibid.

[85] EEOC, "Policy Guidance: Provisions of the ADA," p. 11.

Explaining why EEOC has not published the promised policy guidance, the Associate Legal Counsel noted that there is only so much the Commissioners can consider at one time.[87] Furthermore, EEOC has addressed the reasonable accommodation and qualified individual areas in other documents, such as the interpretive appendix to the regulations and the technical assistance manual published in 1992. Finally, she made the point that in publishing policy guidance too soon, EEOC runs the risk of missing critical ADA issues that have not yet emerged relating to these topics.[88] She added that EEOC did publish guidance on part of the qualified individual with a disability issue, the inconsistent statements/judicial estoppel issue,[89] because it was absolutely necessary at the time based on the sharp conflict developing in the courts.[90]

With respect to whether EEOC plans to develop additional guidance on ADA issues, the Associate Legal Counsel noted that the development of new policy guidance is a decision made solely by the Commissioners.[91] However, the Office of Legal Counsel is looking at two areas: reasonable accommodation and the concept of "qualified individual with a disability," particularly the reasonable accommodation requirement.[92] She said that guidance on these areas currently is going through the policy development process, but she could not predict whether or when these policy guidance documents would be published.[93]

Several Commissioners have indicated the importance of publishing further guidance on reasonable accommodation and qualified individual with a disability. For example, Acting Chairman Igasaki noted that reasonable accommodation is an area of law that will be open to interpretation and therefore the need for guidance on it would always be there.[94]

Litigation as a Policy Development Tool

EEOC also develops policy on the ADA through its litigation activities, including systemic litigation and filing of *amicus* briefs, under the direction of the General Counsel. Two units in the Office of General Counsel, in particular, are actively involved in EEOC's policy development process. The Systemic Enforcement Services unit develops Commission policy through the pursuit of systemic cases. According to an assistant general counsel heading one of the litigation teams in the unit, the unit seeks to litigate cases that raise novel legal questions and would lead to law reform or development of authority for those issues.[95] The Appellate Services unit furthers EEOC policy development through *amicus* briefs in cases before the U.S. courts of appeal.[96] Appellate Services uses *amicus* litigation and appeals of its own cases to develop and clarify the law, and also looks for other cases at the court of appeals level that might resolve unsettled issues of law. *Amicus* briefs serve as official EEOC policy positions, particularly in cases where the issues have not previously been addressed by EEOC.[97]

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[86] *See* David Eichenauer, Access to Independence and Mobility, fax to Nadja Zalokar, USCCR, June 4, 1998 (stating: "'Reasonable accommodation' could be defined better. . . . It is a different concept allowing consideration of individual circumstances and perhaps this is not always understood. . . .").

[87] Mastroianni interview, p. 2.

[88] Ibid.

[89] *See* EEOC, "EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a 'Qualified Individual with a Disability' Under the Americans with Disabilities Act of 1990 (ADA)," (EEOC Notice 915.002), Feb. 12, 1997 (hereafter cited as EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits").

[90] Mastroianni interview, pp. 2–3.

[91] Ibid., p. 2.

[92] Ibid.

[93] Ibid.

[94] Paul Igasaki, Acting Chairman, EEOC, interview in Washington, DC, Apr. 7, 1998, p. 2 (hereafter cited as Igasaki interview).

[95] Gerald Letwin, Assistant General Counsel, Systemic Enforcement Services, Office of General Counsel, EEOC, interview in Washington, DC, Apr. 6, 1998, p. 1 (hereafter cited as Letwin interview).

[96] *See* Vincent Blackwood, Assistant General Counsel, and Robert Gregory, Senior Attorney, Appellate Services, Office of General Counsel, EEOC, interview in Washington, DC, Apr. 2, 1998 (hereafter cited as Blackwood and Gregory interview). The Appellate Services unit also works closely with the Solicitor General in preparing *amicus* briefs filed in cases before the U.S. Supreme Court. Ibid., p. 1.

[97] Blackwood and Gregory interview, p. 2.

Staff in both of these units said that they have a close working relationship with the Office of Legal Counsel and its ADA Policy Division. A staff member of Systemic Enforcement Services, for instance, said that he often informally seeks the opinion of staff in the Office of Legal Counsel before completing work on a cutting edge issue. He added that he does on most ADA cases because the Office of Legal Counsel staff has done a lot of "good and hard thinking" about the ADA.[98] The head of the Appellate Services unit stated that his unit and the Office of Legal Counsel are aware of what the other office is doing. He provides the Office of Legal Counsel copies of briefs filed by his unit, and the Office of Legal Counsel may consult with him to determine which issues require policy guidance.[99]

EEOC's Legal Counsel explained that development of policy through litigation and policy guidance is a continuum—both are tools that help EEOC reach the same goal.[100] A staff member of Systemic Enforcement Services described the relative advantages of litigation and development of policy guidance as policymaking tools for the EEOC. In some cases, litigation is more appropriate than policy guidance because the situation is fact specific. In other circumstances, policy guidance may be more appropriate. In general, he said, EEOC issues very little policy guidance, "because guidance can be used against you." Further, so many issues come up that it is not appropriate to establish policy guidance on every single issue. In addition, sometimes it is preferable to let an issue "percolate up through the courts," after which there may or may not be a need for guidance. Therefore, he said, policy guidance and litigation are two very complementary ways of developing the law.[101]

Like policy guidance, litigation can be effective in changing employers' practices. Big companies, in particular, follow EEOC's litigation docket. As a result, EEOC can make statements through its litigation that get incorporated by employers into their practices.[102] The Legal Counsel indicated that in her opinion, EEOC has used both tools—issuance of policy guidance and litigation—effectively, especially for the ADA.[103]

Initial Guidance on Major Provisions of Title I

Shortly after receiving enforcement responsibility for title I of the ADA, EEOC released policy guidance summarizing the employment provisions of the ADA and EEOC's responsibilities in enforcing the act. This policy guidance document, along with EEOC's title I regulations and interpretive guidance, provide EEOC's initial guidance on major provisions of title I of the ADA. Published in August 1990, just 1 month after enactment of the ADA, this policy guidance defines some of the act's key terms, such as "disability," "direct threat," "undue hardship," and "reasonable accommodation."[104] The guidance also discusses EEOC's responsibilities under the ADA.[105] The guidance focuses on such basic elements of the law as who it protects and how it defines discrimination.

Who Is Protected?

The policy guidance document explains that title I prohibits discrimination against qualified individuals with disabilities. To be protected under the act, an individual must have, or be perceived as having, a disability and be qualified to perform the essential functions of the job, with or without reasonable accommodation.[106] The guidance explains further that these key terms are defined precisely in the act.[107] The terms, "qualified" and "essential," along with the term "reasonable accommodation," are, according to the guidance, "central to the nondiscrimination mandate of the ADA."[108]

EEOC's title I regulations list physical and mental impairments that may be disabilities covered under the ADA.[109] EEOC's policy guidance on the ADA's major provisions lists conditions excluded from the statute's coverage. These include current illegal drug use, homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.[110]

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[98] Letwin interview, p. 4.

[99] Blackwood and Gregory interview, p. 2.

[100] Vargyas interview, p. 2.

[101] Letwin interview, p. 5.

[102] Ibid.

[103] Vargyas interview, p. 2.

[104] EEOC, "Policy Guidance: Provisions of the ADA."

[105] *See generally* ibid.

[106] *See id.* at §§ 12102(2), 12111(8) (1994).

[107] EEOC, "Policy Guidance: Provisions of the ADA," p. 3.

[108] Ibid.

[109] These include any physiological disorder, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, spe-

Discrimination Defined

EEOC's ADA regulations specify that employers may not discriminate with respect to several employment activities and practices.[111] EEOC's policy guidance lists the seven forms of discrimination prohibited in the act and EEOC's title I regulations:

- limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;[112]
- participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);[113]
- utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability; or that perpetuate the discrimination of others who are subject to common administrative control;[114]
- excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;[115]
- not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;[116]
- using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;[117] and
- failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such

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cial sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h) (1997).

[110] EEOC, "Policy Guidance: Provisions of the ADA," p. 3, n. 3, citing 29 C.F.R. § 1630.3(d)(1)–(4), (e) (1997).

[111] These include: recruitment, advertising, and job application procedures; hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; rates of pay or any other form of compensation and changes in compensation; job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists; leaves of absence, sick leave, or any other leave; fringe benefits available by virtue of employment, whether or not administered by the covered entity; selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training; activities sponsored by a covered entity including social and recreational programs; and any other term, condition, or privilege of employment. 29 C.F.R. § 1630.4 (1997).

[112] 42 U.S.C. § 12112(b)(1) (1994). *See also* 29 C.F.R. § 1630.5 (1997).

[113] 42 U.S.C. § 12112(b)(2) (1994). *See also* 29 C.F.R. § 1630.6 (1997).

[114] 42 U.S.C. § 12112(b)(3) (1994). *See also* 29 C.F.R. § 1630.7 (1997).

[115] 42 U.S.C. § 12112(b)(4) (1994). *See also* 29 C.F.R. § 1630.8 (1997).

[116] 42 U.S.C. § 12112(b)(5) (1994). *See also* 29 C.F.R. § 1630.9 (1997).

[117] 42 U.S.C. § 12112(b)(6) (1994). *See also* 29 C.F.R. § 1630.10 (1997).

> employee or applicant (except where such skills are the factors that the test purports to measure.[118]

EEOC also considers "disability harassment" a form of discrimination under the ADA. Disability harassment is analogous to sexual harassment or racial harassment charges brought under title VII of the Civil Rights Act of 1964. Like these other forms of harassment, a case of disability harassment may be based on a hostile environment theory. A law newsletter recently reported on a dispute involving EEOC's regional office in Chicago and Nippon Express, U.S.A., a national shipping company in Franklin Park, Ill.[119] The complainant in the case alleges that he was subject to a campaign of harassment from 1992 to 1996 because he has HIV infection.[120] According to an EEOC supervisory attorney: "When they [coworkers and managers] found out the employee was HIV positive, he was criticized, his job duties were taken away and he was subjected to cool comments. This went on for an extended period of time and then he resigned."[121]

Defenses

EEOC's policy guidance also lists the statute's defenses for an employer charged with ADA discrimination, although it does not offer indepth discussions of key concepts and terms relating to defenses under the act.

Business Necessity Defense

The guidance explains that one possible employer defense is to rely on the need for qualifications standards. Under this defense, where a charging party alleges that qualification standards, tests, or other selection criteria screen out or tend to screen an individual with a disability, the respondent may defeat this claim with a showing that the qualification standards, tests, or selection criteria are "job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation."[122]

The guidance does not define "job related" and "business necessity," although an understanding of these concepts is crucial to any case in which the employer is relying on qualifications standards as a defense. The concept of business necessity has been an important part of employment discrimination law since the U.S. Supreme Court first enunciated it in *Griggs v. Duke Power Company*[123] in 1971. The Court used the term as an employer defense with reference to charges of discrimination not based on intentional acts but on the discriminatory effect of neutral employment practices.[124]

Though the term has been used since *Griggs*, neither the Supreme Court nor any other court has been crystal clear on its meaning. The Fourth Circuit perhaps has come the closest with this definition it used in a race discrimination case based on adverse impact:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[125]

This definition includes all the key concepts in the term, namely, that the business practice is necessary to the work of the employer; that the practice actually accomplishes the purpose it is alleged to serve; and that there is no alternative, less discriminatory method that would accomplish the purpose equally well.[126] This last element of the business necessity test is modified in the context of disability discrimination under the ADA or section 504 to refer instead to a reasonable accommodation that would allow an individual with a disability to perform the essential functions of a job.[127] Thus, according to the ADA, a defendant claiming that qualifications standards, tests, or selection criteria "have been shown to be job-related and consistent with business necessity" must take the additional step of showing that no reasonable accommodation would allow the individual with a disability to accomplish the required performance.[128]

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[118] 42 U.S.C. § 12112(b)(7) (1994). *See also* 29 C.F.R. § 1630.11 (1997).

[119] *See* LRP Publications, "EEOC Pursues ADA Hiring and On-the-Job Harassment Claims," *National Disability Law Reporter—Highlights*, vol. 11, iss. 8 (Apr. 9, 1998), p. 3.

[120] Ibid.

[121] Ibid.

[122] 42 U.S.C. § 12113(a) (1994). *See also* EEOC, "Policy Guidance: Provisions of the ADA," p. 6.

[123] 401 U.S. 424 (1971).

[124] *Id.* at 431.

[125] Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971) (citations omitted).

[126] *See* Barbara Lindemann and Paul Grossman, *Employment Discrimination Law*, 3rd ed., vol. I (Washington, DC: Bureau of National Affairs, 1996), pp. 106–10.

The interpretive guidance accompanying EEOC's title I regulations states that "[t]he concept of 'business necessity' has the same meaning as the concept of 'business necessity' under section 504 of the Rehabilitation Act of 1973."[129] The section 504 regulations state that if a test or other criterion tends to screen out individuals with disabilities, the employer must show that it is "job related" and consistent with business necessity for the position in question and that there is no alternative, nondiscriminatory criterion available.[130]

Business necessity may be viewed as a gauge or measure for whether a given employment practice is legitimate or discriminatory. The interpretive guidance states that "[s]election criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity."[131]

The ADA's legislative history clarifies the meaning of business necessity and job relatedness in the context of disability discrimination. By taking earlier caselaw addressing disparate impact as a theory of discrimination and adapting it to the disability context, the House Education and Labor Committee report establishes a clear meaning for these terms under the ADA:

> The interrelationship of these requirements in the selection procedure is as follows: If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job. If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation. However, the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion.[132]

Thus, as one scholar has noted, "to be job-related and consistent with business necessity, a qualification standard must pertain to the performance of an essential function of the job at issue. The requirement that a qualification standard pertain to an essential function of the job reflects the ADA's underlying view that an individual with a disability should not be denied a job simply because the disability interferes with performance of functions that are only marginally related to the job."[133]

Defense for Religious Entities

The guidance mentions a second defense for employers under title I, which is reserved for religious entities. The statute provides that a religious entity is not prohibited from giving preference in employment to individuals of a particular religion.[134] The statute describes a religious entity as any "religious corporation, association, educational institution, or society."[135] In addition, the ADA states that a religious entity may require all applicants and employees to conform to its religious tenets.[136]

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[127] *See, e.g.*, 42 U.S.C. § 12113(a) (1994).

[128] 42 U.S.C. § 12113(a) (1994).

[129] 29 C.F.R. pt. 1630 app. § 1630.10 (1997). *See also* Bentivegna v. United States Dept. of Labor, 694 F.2d 619 (9th Cir. 1982).

[130] 34 C.F.R. § 104.13(a) (1997).

[131] 29 C.F.R. pt. 1630 app. § 1630.10 (1997).

[132] H.R. REP. NO. 101–485(II), at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 353–54.

[133] Burgdorf, *Disability Discrimination in Employment Law*, p. 223 (H.R. REP. NO. 101–485(II), at 55 (1990); H.R. REP. NO. 101–485(III), at 25 (1990)).

[134] 42 U.S.C. § 12113(c)(1) (1994).

[135] *Id.*

[136] *Id.* at § 12113(c)(2).

Food Handling by an Individual with Infectious or Communicable Disease

Finally, the statute provides that an employer may refuse to employ or continue to employ an individual with an infectious or communicable disease in a job requiring food handling, if there is no reasonable accommodation that would prevent that individual from transmitting the disease to others through the handling of food.[137] The act requires the Secretary of Health and Human Services to maintain and update annually a list of infectious and communicable diseases that actually are transmitted through food handling.[138] The Secretary also must publish the methods of transmission of these diseases and widely disseminate both the list and the methods of transmission.[139]

Guidance on Defining Disability Under the ADA

To assist its investigative staff in understanding the complex issue of when a person is considered as having a disability under the ADA, EEOC developed a comprehensive enforcement guidance that provides a detailed analysis of the statutory and regulatory requirements for a claimant to show that he or she has a disability within the meaning of the ADA.[140] This policy guidance, published in March 1995, provides instructions on applying this definition in charge processing and outlines the requirements for showing that a disability exists under the ADA.[141]

Background

A threshold requirement for initiating a claim under the ADA is that an individual have a disability as the term is defined in the act. The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[142] This definition illustrates one notable difference between the ADA and other civil rights statutes: defining the protected class of people against whom the statute proscribes discrimination is not a simple matter. With statutes such as the Age Discrimination in Employment Act,[143] for example, an individual claiming a violation of the statute need only show that he or she is over 40 to be considered a member of the protected class. Similarly, with title VI and title VII of the Civil Rights Act of 1964, there is no issue as to a complainant's status as a member of a racial, national origin, or color group or the complainant's sex.[144]

However, with the ADA, as one commentator has noted, "that simplicity is lost."[145] This commentator states further:

> Unlike other federal laws against discrimination, the ADA does not conveniently set forth clear lines of demarcation separating persons who are covered from those who are not. The applicable parameters are not rigid or concrete, and there is no facile test that can be universally applied to determine whether a given impairment or condition is serious enough to qualify for protection from discrimination. In short, the protected class is not clearly identifiable. As a result, courts have become increasingly familiar with the peculiar task of determining whether a particular individual falls within a class of persons to whom the statute is intended to apply: namely, persons who have a "disability." [citation omitted] The task can be difficult, largely because the drafter of the statute—whether by design or neglect—imbued this key term with ambiguity as well as complexity.[146]

The complexities and ambiguity inherent in the definition of disability have resulted in much debate over who should be considered a person with a disability for the purposes of the ADA. There appears to be a rift between EEOC and some Federal courts on the definition of disability, largely because EEOC, in correctly following Congress' mandate with the ADA, has interpreted the term broadly, while some courts have applied a more narrow reading.[147] On the other hand, the Supreme Court expressly relied on EEOC and DOJ interpretative documents in holding that asymptomatic HIV infection is a disability.[148]

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[137] *Id.* at § 12113(d)(2).

[138] *Id.* at § 12113(d)(1).

[139] *Id.* at § 12113(d)(1)(C)–(D).

[140] *See generally* EEOC, "Definition of the Term 'Disability'."

[141] *See generally* ibid.

[142] 42 U.S.C. § 12102(2) (1994). The ADA also makes it unlawful to discriminate against associates of people with disabilities. *Id.* at § 12112(b)(4). The ADA prohibits "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." *Id.* at § 12112(b)(4). For example, an employer may not discriminate against an employee who is caring for someone with AIDS or who has a disabled family member the care of whom the employer feels will require the employee to take time away from work. Bonnie P. Tucker and Bruce A. Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law*, vol. 1, supp. 8 (March 1996) (Horsham, PA: LRP Publications, 1992), at 22:18.

[143] 29 U.S.C. §§ 621–634 (1994).

[144] *See* 42 U.S.C. §§ 2000d, 2000e (1994).

[145] Thomas D'Agostino, *Defining "Disability" Under the ADA: 1997 Update* (Horsham, PA: LRP Publications, 1997), p. i.

[146] Ibid.

The debate has centered on the meaning of specific terms within the ADA's definition of disability, such as "substantially limits" and "major life activity." EEOC has stood for a broad interpretation of these terms in its policy guidance, but some courts are disregarding EEOC's policy guidance.[149]

Commentators have noted a trend among the Federal courts toward a narrow interpretation of the statute. For example, a recent article reported that courts are rejecting ADA claims on the basis that plaintiffs cannot show that they have a disability within the meaning of the statute.[150] A common employer defense is the "no disability" defense in which employers argue that ADA plaintiffs' cases should fail because they cannot show that their impairment is "substantially limiting" to a "major life activity," and therefore the impairment is not a disability within the meaning of the statute.[151] The defense has been so successful that employers now are using it with conditions or impairments, such as insulin-dependent diabetes[152] and cancer,[153] which, according to the article, "many have assumed to be *per se* disabilities under the statute."[154] In addition, the article reported that, based on a study of 261 decisions in which Federal courts of appeals issued rulings on claims under the ADA, "plaintiffs in ADA cases have not fared well in federal appellate courts and . . . certain circuits have been particularly unreceptive to ADA claims."[155]

ADA's Definition of Disability

The March 1995 enforcement guidance specifically addresses the issue of who is considered disabled under the ADA.[156] The guidance explains that a charging party must meet one of the three prongs within the definition of disability under the ADA by showing that he or she: (1) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (2) has a record of such an impairment, or (3) has been regarded as having such an impairment.[157]

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[147] This is evident in differences of opinion between EEOC and the Federal courts. *Compare* Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995) (citing EEOC guidance concerning mitigating measures with approval); Coghlan v. H.R.J. Heinz Co., 851 F. Supp. 808, 811–14 (N.D. Tex. 1994) (rejecting EEOC guidance as contradictory to "substantial limitation" requirement); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1444–45 (W.D. Wis. 1996) (rejecting EEOC guidance on the same grounds as *Coghlan*). *See generally* the discussions under the headings "Mitigating Measures," and "*Per Se* Disabilities," this chapter.

[148] *See* Bragdon v. Abbott, 66 U.S.L.W. 4601, 4607 (U.S. June 25, 1998).

[149] *See, e.g.* Coghlan, 851 F. Supp. at 811–14 (rejecting EEOC's interpretive guidance on substantial limitation requirement); Schluter, 928 F. Supp. at 1444–45 (rejecting EEOC's interpretive guidance on mitigating measures).

[150] "Most Federal Appeals Court Decisions Favor ADA Defendants, Analysis Shows," *National Disability Law Reporter Highlights*, vol. 10, iss. 10 (Nov. 20, 1997), pp. 1, 8–9 (hereafter cited as "Most Federal Appeals Court Decisions Favor ADA Defendants, Analysis Shows," *NDLR Highlights*).

[151] The article notes that the trend began in 1994 with the case of *Bolton v. Schreiner*, 36 F.3d (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995),which other courts have followed widely in the past few years. In *Bolton*, the court rejected an ADA claim because it found that the plaintiff's back and foot impairments did not qualify as a "disability" under the ADA. Specifically, the *Bolton* court found that the plaintiff did not show that he was substantially limited in his ability to work. *Id.* at 944. "Most Federal Appeals Court Decisions Favor ADA Defendants, Analysis Shows," *NDLR Highlights*, p. 9.

[152] *See, e.g.*, Coghlan v. H.R.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Texas 1994).

[153] *See, e.g.*, Ellison v. Software Spectrum, Inc., 85 F. 3d 187, 191–92 n.3 (5th Cir. 1996).

[154] "Most Federal Appeals Court Decisions Favor ADA Defendants, Analysis Shows," *NDLR Highlights*, p. 9.

[155] Ibid., p. 8.

[156] EEOC, "Definition of the Term 'Disability'," EEOC issued this guidance in the form of a memorandum. The memorandum states that the guidance was issued as part of EEOC's Compliance Manual, which is designed for EEOC staff investigating charges of discrimination under the ADA, as well as for employees' and employers' use.

[157] 42 U.S.C. § 12102(2) (1994). To establish a prima facie case of discrimination in violation of the ADA, the plaintiff must prove that (1) he has a disability; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimina-

The first prong of the ADA's definition of disability addresses actual disabilities, as opposed to the other two prongs, which address records of or perceived disabilities.[158] In creating this first prong, Congress used terminology almost identical to that in the Rehabilitation Act of 1973.[159]

The key inquiry under the second prong is whether an employer relied on an individual's record of disability, whether accurate or not, in making an adverse employment decision.[160] Congress intended that the ADA apply to individuals who have a record of having an impairment, "i.e., an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."[161] This provision was included in the 1989 ADA bill in part to protect individuals who were recovered from impairments that previously had limited them in a major life activity.[162] Discrimination on the basis of a past impairment is prohibited under the ADA.[163] The ADA also protects a second group, those who have been misclassified as having a particular illness or condition.[164]

Under the third prong of the term "disability," an individual can have a cause of action under the ADA if he or she is considered to have a disability.[165] EEOC's title I regulations state that there are three different ways in which a claimant can show that he or she was perceived as having a disability under the third prong. The individual must demonstrate that he or she (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as such, (2) has an impairment that is substantially limiting only as a result of the attitudes of others, or (3) has no impairment but is treated as having a substantially limiting impairment.[166] According to the House Education and Labor Committee report accompanying the ADA in 1990:

> The third prong of the definition includes an individual who is regarded as having a covered impairment. This third prong includes an individual who has a physical or mental impairment that does not substantially limit a major life activity, but that is treated by a covered entity as constituting such a limitation. The third prong also includes an individual who has a physical or mental impairment that substantially limits a major activity only as a result of the attitudes of others toward such impairment or has no physical or mental impairment but is treated by a covered entity as having such an impairment[167]

In the case of *School Board of Nassau County v. Arline,*[168] the U.S. Supreme Court clearly articulated the rationale behind the third prong. The Court, in interpreting the provisions of the Rehabilitation Act, explained that the "regarded as" prong was designed to protect individuals against negative fears, misperceptions, and stereotypes that can substantially limit their ability to function at work. The Court observed:

> Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment. . . . By amending the definition of "handicapped individual" to include not only those who are actually physically impaired but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths

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tion because of his disability. Holbrook v. City of Alpharetta, 112 F.3d 1526, (11th Cir. 1997). As one commentator has noted, "[p]roving the existence of a disability can be thought of as a preliminary hurdle that each ADA claimant must clear." *See* Thomas D'Agostino, *Defining "Disability" Under the ADA: An Analysis of 60 Decisions* (Horsham, PA: LRP Publications, 1996), p. 1 (hereafter cited as D'Agostino, *An Analysis of 60 Decisions*).

[158] 42 U.S.C. § 12102(2)(A) (1994).

[159] 29 U.S.C. § 706(8)(B)(i) (1994).

[160] D'Agostino, *Defining "Disability" Under the ADA,* p. 7. *See also* EEOC, "Definition of the Term 'Disability'," § 902.

[161] S. REP. NO. 101–116, at 23 (1989). This report of the Senate Committee on Labor and Human Resources accompanied the 1989 ADA bill, which was not enacted.

[162] H.R. REP. NO. 101–485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

[163] H.R. REP. NO. 101–485(II), at 52–53 (1990), *reprinted in* 1990 U.S.C.C.A.N 303, 334–35. For example, the ADA protects persons with a history of such conditions and impairments as mental or emotional illness, heart disease, or cancer.

[164] H.R. REP. NO. 101–485(II), at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N 303, 335. For example, a person misclassified as being mentally retarded would be covered under this second group.

[165] 42 U.S.C. § 12102(2)(C) (1994).

[166] 29 C.F.R. § 1630.2(l)(1)–(3) (1997).

[167] H.R. REP. NO. 101–485(II), at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N 303, 335.

[168] 480 U.S. 273 (1987).

> and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.[169]

The Senate Committee on Labor and Human Resources report notes: "This third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity."[170] The House Committee on Education and Labor report uses as an example someone who is a severe burn victim and who, although not substantially limited in any major life activity, is perceived as being disabled.[171] The report further notes that:

> another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.[172]

In its interpretive guidance accompanying the title I regulations, EEOC provides examples of stereotypes, fears, or misconceptions. These include concerns relating to productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, worker's compensation costs, or acceptance by coworkers and customers.[173]

Related Concepts and Issues

In policy guidance, EEOC states that "[w]hen determining whether a charging party satisfies the definition of 'disability,' the EEOC investigator should remember that the concepts of 'impairment,' 'major life activity,' and 'substantially limits' are relevant to all three parts of the definition of 'disability'."[174] These three terms add to the confusion surrounding the question of whether or not an individual has a disability covered under the ADA.[175]

Physical or Mental Impairments

EEOC policy guidance defines "impairment" as "a physiological disorder affecting one or more of a number of body systems or a mental or psychological disorder."[176] In both the Rehabilitation Act and the ADA this term is defined in general terms because Congress intended to cover a broad range of potential disabilities.[177] As the Senate report accompanying the 1989 ADA bill acknowledges, it would be impossible "to include in the legislation a list of all the specific conditions, diseases, or infections. . .because of the difficulty of ensuring the comprehensiveness of such a list."[178]

Following the section 504 regulations,[179] the EEOC title I regulations set out a partial list of specific covered impairments:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[180]

The legislative history of the statute indicates that Congress intended for coverage to be limited only to those individuals with significant health problems. For example, Congress observed that the statute's coverage excluded minor impairments such as "a simple infected finger."[181] In addition, physical characteristics, such as eye color or hair color, and social and economic disadvantages, such as being poor, also are not covered.[182]

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[169] *Id.* at 283–84 (citations omitted).

[170] S. REP. NO. 101–116, at 24 (1989).

[171] H.R. REP. NO. 101–485(II), at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 335.

[172] S. REP. NO. 101–116, at 24 (1989).

[173] 29 C.F.R. pt. 1630 app. § 1630.2(l) (1997).

[174] EEOC, "Definition of the Term 'Disability'."

[175] The Supreme Court recently addressed the concepts of "impairment," "major life activity," and "substantially limits" in a case involving asymptomatic HIV infection. Bragdon v. Abbott, 66 U.S.L.W. 4601 (U.S. June 25, 1998).

[176] *Id.* § 902.

[177] *See* 29 U.S.C. § 706(8)(B)(i) (1994); 42 U.S.C. § 12102(2)(A) (1994).

[178] S. REP. NO. 101–116, at 22 (1989).

[179] *See* 28 C.F.R. § 41.31(b)(1) (1997).

[180] 29 C.F.R. § 1630.2(h) (1997).

[181] H.R. REP. NO. 101–485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

Substantial Limitation

On the second key requirement, substantial limitation of a major life activity, EEOC policy guidance makes very clear that the most important focus of an ADA inquiry for the agency or a court must be on the individual with an impairment, not the impairment or medical condition itself. The guidance states:

> When analyzing the degree of limitation, one must remember that the determination of whether an impairment substantially limits a major life activity must be made with reference to a specific individual. The issue is whether an impairment substantially limits any of the major life activities of the person in question, not whether the impairment is substantially limiting in general. Thus, one must consider the extent to which an impairment restricts a *specific individual's* activities and the duration of that individual's impairment.[183]

This appears consistent with the ADA's overarching theme that each person with a disability must be viewed as a unique individual whose disability is an aspect of his or her personal circumstance.

EEOC regulations provide criteria to be considered in determining if a particular individual is substantially limited in a major life activity and thus if an impairment is a disability covered by the ADA: the nature and severity, the duration or expected duration, and the permanent or long term impact of the impairment.[184] These criteria are central to assessing whether a given impairment or condition substantially limits a major life activity. As such, they form the key issues around which many ADA cases relating to the definition of disability revolve.

The "nature and severity" criterion is broad and views the overall impact of the impairment on a person's life. In recent testimony before Congress, one attorney specializing in disabilities law presented data on ADA cases relating to whether people with specific impairments experienced the level of "disability" required to be covered under the statute. These cases summarized the courts' interpretation of the ADA's definition of disability as it relates to employment. The attorney's data led her to conclude:

> The ADA has not served as a vehicle by which persons with relatively trivial impairments can achieve unmerited advantages. In fact, it is much easier to argue that the opposite is true: that, through the use of the "substantial limitation" provision of the ADA, the courts are finding that many persons with relatively severe physical and mental impairments are not "disabled" under the statute.[185]

EEOC has noted that all ADA cases must be resolved using a fact-specific, case-by-case approach. However, this approach does not entirely resolve the issue. As studies of the caselaw indicate, two basic definitional issues relating to disability are: when and under what circumstances is a person substantially limited in a major life activity, and what guidelines can be used in making this determination.

The duration and impact of the person's impairment also influence the decision as to whether a disability is covered under the ADA. In a May 1997 case, an employee with a history of knee injury alleged that her termination from employment was discrimination on the basis of disability.[186] The court stated that the only issue on appeal was whether "a temporary disability—a knee injury—from which the plaintiff fully recovered in a month and from which she has no residual disability, is a handicap. . . ." within the meaning of the State statute under which she sued.[187] In finding that the plaintiff's temporary knee injury did not qualify as a disability, the court cited to EEOC's regulations implementing the ADA,[188] which state:

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[182] H.R. REP. NO. 101–485(III), at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

[183] EEOC, "Definition of the Term 'Disability'," § 902.4(a) (emphasis added).

[184] 29 C.F.R. §§ 1630.2(j)(2)(i)–(iii) (1997).

[185] Melinda Maloney and Thomas D'Agostino, *Defining "Disability" Under the ADA: An Analysis of 60 Decisions* (Horsham, PA: LRP Publications, 1997), p. 6, citing Hearing before the Labor and Human Relations Committee Subcommittee on Disability Policy, July 26, 1995 (statement of Melinda Maloney).

[186] Hallgren v. Integrated Financial Corp., 10 NAT'L DISABILITY L. REP. (LRP) ¶ 61 (Mass. App. Ct. 1997).

[187] *Id.*

[188] *Id.* (citing 29 C.F.R. pt. 1630.2(j) (1997)).

> The determination of whether an individual has a disability is. . . based on. . .the effect of [the] impairment on the life of the individual. . . . [T]emporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza.[189]

The decisions of the Federal courts have helped to define the scope of the term "physical or mental impairment" with respect to the length of time for a limitation of a major life activity to be "substantial." In the courts, claimants bringing cases based on temporary disabilities largely have failed to achieve protection under the ADA. One commentator noted that in many cases Federal courts have ruled that short term illnesses or conditions are not disabilities within the meaning of the ADA.[190] On the other hand, the same commentator noted that "some courts have found some impairments to be of sufficient duration to constitute a disability even though the impairment may not be permanent."[191] Generally, since 1995, the Federal courts have held that temporary disabilities are not covered under the ADA's nondiscrimination prohibition.[192]

Major Life Activity

The EEOC title I regulations define "major life activity" as meaning "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, *learning*, and working."[193] In the accompanying interpretive guidance, EEOC notes that the list of examples in the regulations is not exhaustive and that other examples of major life activities "include, but are not limited to, sitting, standing, lifting, [and] reaching."[194] In its policy guidance, EEOC adds that "[m]ental and emotional processes such as thinking, concentrating, and interacting with others are other examples of major life activities."[195] EEOC has never issued a comprehensive list of major life activities or attempted to define further the term's meaning, perhaps by developing specific criteria for what constitutes a major life activity.

As ADA caselaw developed, questions arose as to whether certain activities are major life activities within the meaning of the statute. For example, a split arose in the circuits over whether reproduction was a major life activity.[196] The Fourth Circuit, in its opinion in *Runnebaum v. NationsBank*, stated: "We agree that procreation is a fundamental human activity, but are not certain that it is one of *the* major life activities contemplated by the ADA."[197] Similarly, the Eighth Circuit, in *Krauel v. Iowa Methodist Medical Center*, concluded that reproduction was not a major life activity.[198] The court noted:

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[189] 29 C.F.R. pt. 1630 app § 1630.2(j) (1997).

[190] *See* Christopher G. Bell, "Who Is an Individual with a Disability: Key Judicial Trends in the Definition of Disability Under the Americans with Disabilities Act," April 1997, in National Employment Law Institute, *1997 Americans with Disabilities Act Compliance Manual* (Washington, DC: National Employment Law Institute, 1997) p. 2 (hereafter cited as Bell, "Who Is an Individual with a Disability") (citing Roush v. Weastec, Inc. 96 F.3d 840, 844 (6th Cir. 1996)) ("Because plaintiff's kidney condition was temporary it is not substantially limiting and, therefore, not a disability under the ADA"); Sanders v. Arneson Products, Inc., 91 F.3d 1351, 1354 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1247(1997) (a psychological impairment lasting 3½ months was not a disability); McDonald v. Commonwealth of Pennsylvania, 62 F. 3d 92, 96 (3rd Cir. 1995) (less than 2-month recovery period from abdominal surgery was insufficient to constitute a disability); Evans v. City of Dallas, 861 F.2d 846, 852–53 (5th Cir. 1988) (knee impairment requiring surgery was not disability under the Rehabilitation Act because it was not permanent); Oswalt v. Sara Lee Corp., 889 F. Supp. 253, 257–58 (N.D. Miss. 1995), *aff'd*, 74 F.3d 91 (5th Cir. 1996) (missing work for 1 month because of medication for 1 month for high blood pressure was not a substantial limitation of a major life activity); Jones v. Alabama Power Co., 1995 U.S. Dist. LEXIS 20971, *43–*46 (N.D. Ala. 1995), *aff'd* 77 F.3d 498 (11th Cir. 1996) (persons with temporary conditions do not have a disability); Muller v. Automobile Club, 897 F. Supp. 1289, 1295–97 (S.D. Cal. 1995) (plaintiff's fear of threats from disgruntled customer of only 5 months' duration was not a substantial limitation of working)).

[191] *See* Bell, "Who Is an Individual with a Disability," p. 2 (citing Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996)). Although short term, temporary restrictions generally are not substantially limiting, an impairment does not necessarily have to be permanent to rise to the level of a disability. Some conditions may be long term or potentially long term, in that their duration is indefinite, unknown, or expected to last several months. Such conditions, if severe, may constitute disabilities. 2 EEOC Compliance Manual, Interpretations (CCH) § 902.4, ¶ 6884, p. 5319 (1995); Wood v. Alameda, 1995 U.S. Dist. LEXIS 17514 (N.D. Cal. 1995) (mental impairment that left employee unable to work for a year may be a disability even though it was not permanent); Patterson v. Downtown Medical & Diagnostic Center, 866 F. Supp. 1379, 1381 (M.D. Fla. 1994) (plaintiff not required to allege a permanent impairment under the ADA).

[192] *See* McDonald, 62 F.3d at 96–97 (holding that an employee who was fired because she could not work for 2 months while recovering from surgery was not entitled to ADA protection; the employee's inability to work was not permanent nor for a period of time lengthy enough to trigger the protections of the statute).

[193] 29 C.F.R. § 1630.2(i) (1997).

[194] 29 C.F.R. App. § 1630.2(i) (1997).

[195] EEOC, "Definition of the Term 'Disability'," § 902.3(b).

> Because the ADA does not define the term major life activity, we are guided by the definition provided in 29 C.F.R. § 1630.2, the Equal Employment Opportunity Commission (EEOC) regulations issued to implement Title I of the ADA. . . . While we recognize that this list [provided in the EEOC regulations] is non-exclusive, we note that reproduction and caring for others are not among the examples of listed activities.[199]

The court concluded that treating reproduction as a major life activity would be "a considerable stretch of Federal law."[200] However, in *Bragdon v. Abbott*[201] the First Circuit held that a woman who was HIV positive, but experiencing no symptoms, was disabled within the meaning of the statute, because she was substantially limited in the major life activity of reproduction.[202]

The Supreme Court resolved the split in *Bragdon v. Abbott* in finding that reproduction was a major life activity. In *Bragdon*, the plaintiff relied on an argument made by the U.S. Department of Justice (DOJ) in a 1988 memorandum entitled "Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals."[203] In this memorandum, DOJ argued that asymptomatic HIV infection is a disability under section 504 of the Rehabilitation Act of 1973, upon whose definition of disability the ADA's definition is based. DOJ stated that persons with asymptomatic HIV infection have a disability under the act because they were limited in the major life activity of procreation, or reproduction.[204] The memorandum concludes that "there is little doubt that procreation is a major life activity and the physical ability to engage in *normal* procreation—procreation free from the fear of what the infection will do to one's child—is substantially limited once an individual is infected with the AIDS virus."[205]

The Supreme Court's five-justice majority drew guidance from the Justice Department memorandum as well as from the conclusions of other Federal agencies that had addressed the issue.[206] In the majority opinion, Justice Kennedy stated, "reproduction falls well within the phrase 'major life activity.' Reproduction and the sexual dynamics surrounding it are central to the life process itself."[207] The Court interpreted the term "such as" in the statutory language to connote an illustrative and not exhaustive definition of "major life activity."[208] The Court recognized the limitations that HIV status has on conception and childbirth by emphasizing, "[w]hen significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable."[209] In response to the argument that Abbott was not substantially limited because she could still procreate with only an 8 percent risk of perinatal infection with antiretrovial therapy,[210] the Court stated, "it cannot be said as matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction."[211]

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[196] *Compare* Runnebaum v. NationsBank, 123 F.3d 156, 170 (4th Cir. 1997) *with* Bragdon v. Abbott, 107 F.3d 934 (1st Cir. 1997), *vacated and remanded*, 66 U.S.L.W. 4601 (U.S. June 25, 1998).

[197] 123 F.3d 156, 170 (4th Cir. 1997).

[198] 95 F.3d 674, 677 (8th Cir. 1996). Krauel v. Iowa Methodist Medical Center concerned the case of a respiratory therapist who claimed reproduction and caring for others are major life activities in which she was substantially limited because of her infertility. *Id. See also* Zatarain v. WDSU–Television, Inc., 881 F. Supp. 240, 243 (E.D. La. 1995) (holding that reproduction is not a major life activity under the ADA), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

[199] *See* Krauel, 95 F.3d 674, 677.

[200] *Id.* at 677.

[201] Bragdon v. Abbott, 66 U.S.L.W. 4601, 4606–07 (U.S. June 30, 1998).

[202] *Id.* at 15.

[203] *See* Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, re: Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, Sept. 27, 1988 (hereafter cited as Kmiec memorandum).

[204] Ibid., p. 10. The memorandum states in pertinent part: "Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation—the fulfillment of the desire to conceive and bear healthy children—is substantially limited for an asymptomatic individual." Ibid.

[205] Ibid., pp. 10–11.

[206] Bragdon, 66 U.S.L.W. 4601, 4606–07 (U.S. June 30, 1998).

[207] *Id.* at 4605.

[208] *Id.*

[209] *Id.* at 4606.

Chief Justice Rehnquist dissented from the majority's holding that reproduction is a "major life activity." He argued that the illustrative examples used in the regulations are quite different from reproduction, because they represent activities of repetitive use in the "day-to-day existence of a normally functioning individual."[212] The Chief Justice supported an alternative definition of "major," as meaning "greater in quantity," rather than the primary definition of "comparative importance."[213]

The majority in *Bragdon* declined to address the issue of whether having asymptomatic HIV is a disability *per se*.[214] In its *dicta*, the Court gave a clear indication as to whether people with HIV can make major life activity arguments for activities other than reproduction or procreation. The Court stated, "[g]iven the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry."[215] The Court further stated, "[w]e have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities."[216]

Major Life Activity of Working

Another controversy related to "major life activity" is the ability and extent to which a person can perform a job. EEOC has provided guidance on this major life activity. For example, EEOC has stated in its title I regulations:

> The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[217]

EEOC's requirement for ADA claimants to show substantial limitation in a class or broad range of jobs in order to prove a substantial limitation in the major activity of working has resulted in significant difficulties for some claimants.[218] For example, in a recent case brought by a Delta Airlines pilot diagnosed with narcissistic personality disorder and bipolar disorder, *Witter v. Delta Airlines*,[219] the Eleventh Circuit found that the pilot was unable to show that the airline regarded him as substantially limited in performing nonflying jobs drawing on his skills and experience.[220] The court based this decision on the regulatory requirement that a plaintiff must show substantial limitation in the major life activity of working. Specifically, the court sought to determine the ability to perform a *class* of jobs using similar training, knowledge, skills, or abilities or a *broad range of classes of jobs* not using similar skills and training but *not the inability to perform a single, particular job*.[221]

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[210] *Id.* at 4605.

[211] *Id.* at 4605.

[212] *Id.* at 4611.

[213] *Id.* (Rehnquist, C.J., dissenting).

[214] *Id.* at 4606.

[215] *Id.* at 4604.

[216] *Id.* at 4605.

[217] 29 C.F.R. § 1630(j)(3)(I) (1997). In determining whether an individual is substantially limited in the major life activity of working, one may consider as a factor "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the [*10] impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B). A "broad range of jobs in various classes" is defined as: [t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment. 29 C.F.R. § 1630.2(j)(3)(ii)(C).

See also 29 C.F.R. § 1630.2(j)(3)(I). ("Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.").

[218] *See also* chap. 5, pp. 89–91.

[219] 138 F.3d 1366 (11th Cir. 1998). *See also* Bureau of National Affairs, "Court Holds Pilot Grounded by Delta Has No Claim Under Disabilities Act," *Daily Labor Report* (May 19, 1998), pp. A–5—A–6.

[220] Witter, 138 F.3d at 1370.

[221] *See id.* at 1369–70.

Relying on this language, the court reasoned that Witter would have to show not only that he was perceived as substantially limited in performing his job as a pilot but also that he was similarly limited in his ability to perform all other nonflying jobs for which his training would qualify him.[222] This would include such jobs as pilot ground trainer, flight simulator trainer, flight instructor, consultant for an aircraft manufacturer, and various positions in airline flight operations. Because Witter could not prove that Delta perceived him as substantially limited in all of these other jobs, the court found, based on EEOC's regulatory language, that the airline did not regard him as substantially limited in the major life activity of working.[223]

This example illustrates the seemingly counterintuitive results that can occur when courts apply these regulatory requirements for a showing of substantial limitation of the major life activity of working. For example, the *Witter* case begs the question, why should a pilot have to prove that he is limited in *nonpilot* jobs to show that he has a disability that prevents, or is perceived as preventing him, from performing his job *as a pilot*? In another recent ADA case involving airline pilots, *Sutton v. United Airlines*,[224] the Tenth Circuit determined that the relevant "class of jobs" extended beyond pilots who worked for United, as the plaintiffs contended, but did not extend so far as to include nonpilot jobs. The court stated that the relevant class of jobs was "that of all *pilot* positions at all airlines."[225] Given these two different definitions of the term "class of jobs," one problem with the regulatory requirements relating to showing a substantial limitation in the major life activity of working may be that they are too vague.[226]

Not only does the regulatory guidance seem vague, it seems oddly incongruous, particularly with respect to disability based on the third or "regarded as" prong. The guidance seems to indicate that the plaintiff has to perform the near impossible task of showing *hypothetically* that he would be *regarded as* substantially limited in performing the duties of all the other nonpilot jobs for which his training qualified him. This regulation appears to require courts to place an extremely high burden on claimants seeking to show substantial limitation in the major life activity of working. With respect to the "regarded as" prong in particular, this regulatory guidance seems unclear and probably unrealistic as a standard of proof for plaintiffs.

Beyond the requirements relating to a class of jobs and a broad range of jobs, EEOC identifies three factors that may be considered in determining whether there is a substantial limitation in the major life activity of working: (1) the geographical area within which the individual has reasonable access, (2) jobs within that geographical area (which require the individual's skills) for which that individual has been disqualified because of an impairment, and (3) jobs within that geographical area (which do not require the individual's skills) for which that individual has been disqualified because of an impairment.[227]

Commentators have criticized the rule relating to geographical area on two grounds. First, disabled job applicants will, in some cases, have to expend resources proving that they are substantially limited by showing evidence for these criteria.[228] Second, the geographical limitations could undercut protection from discrimination because they could mean that an individual with a disability who resides in one geographical region would have the protection of the statute while an individual in another region may not have the same protection.[229]

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[222] *See id.* at 1370.

[223] *See id.* (stating: "to establish that Delta perceived him as unable to perform the relevant 'class of jobs,' Witter would have to prove Delta regarded him as unable to perform not just the job of being a pilot, but also the non-piloting jobs we have discussed. Because Witter failed to offer any evidence at all of that, we conclude that he failed to raise a genuine issue that Delta regarded him as significantly restricted in the major life activity of working." *Id.*).

[224] 130 F.3d 893 (10th Cir. 1997).

[225] 130 F.3d 893, 905 (emphasis added).

[226] One commentator refers to the "nebulousness" of the "class of jobs" standard. *See* Steven S. Locke, "The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act," *U. Colo. L. Rev.* vol. 68, p. 122 (1997). He further states that "'[t]he class of jobs' concept becomes muddled because of different interpretations of what makes up a class." *Id.* at 126, n.103. Moreover, "[t]he only guidance courts receive from the EEOC is that this category must exceed one job." *Id.* at 122.

[227] 29 C.F.R. § 1630.2(j)(3)(ii) (1997).

[228] *See* Bonnie P. Tucker and Bruce A. Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law* (Horsham, PA: LRP Publications, 1992), vol. II, supp. 8 (March 1996), at 21:18, n. 88.

The rule may be subject to criticism for a third important reason. In considering working a major life activity along with other major life activities that are based on more basic functions such as seeing, walking, and hearing, the ADA has created a certain amount of confusion as to whether title I claimants must show that they are substantially limited in some major life activity or whether they must show that they specifically are limited in their ability to work.[230] EEOC has tried to clarify any potential confusion by stating that "if the individual is not substantially limited in any other major life activity, then one should consider whether the individual is substantially limited in working."[231] Despite these guidelines, in *Krauel v. Iowa Methodist Medical Center,* the Eighth Circuit found that a respiratory therapist who was infertile was not disabled within the meaning of the statute, in part because infertility did not prevent her from performing her job duties.[232]

In criticizing the *Krauel* decision, an Illinois court cited the EEOC guidance. In *Erickson v. Board of Governors, Northeastern Illinois University,*[233] the court stated that the *Krauel* court should not have combined its analysis of the major life activity of reproduction and caring for others with its analysis of the major life activity of working.[234] Rather, the *Krauel* court should have addressed the two separately, first assessing whether reproduction and caring for others qualified as a major life activity and then, after determining that they did not, determining whether there was a substantial limitation in the major life activity of working itself.[235] The *Erickson* court based this analysis on the EEOC interpretive guidance accompanying the title I regulations, which states, "if an individual is not substantially limited with respect to *any* other major life activity, the individual's ability to perform the major life activity of working should be considered."[236] The *Erickson* court concluded that plaintiff's infertility was a disability within the meaning of the ADA because it found that reproduction was a major life activity that was substantially limited by infertility.[237]

Disability policy expert Robert Silverstein has stated that courts such as the *Krauel* court also are ignoring the plain language of the legislative history with respect to the requirement of substantial limitation and the meaning of major life activity.[238] In accord with the *Erickson* court's observations on the *Krauel* decision, he stated that he believes some courts are engaging in faulty reasoning relating to the "major life activity" issue in which they are confusing the analysis of the major life activity of "working" with that of major life activity in general. Mr. Silverstein stated that some courts, like the *Krauel* court, have confused this issue and have looked *first* to determine if the claimant was limited in the major life activity of working.[239]

Mr. Silverstein noted that EEOC has tried to clarify in its policy guidance that the major life activity of working should become an issue for a court only after a finding that no other major life activity was limited by an impairment. He maintained that some courts have compounded the problem by creating a "Catch–22" situation whereby claimants never are deemed to be covered by the ADA. For instance, the courts may determine that a claimant has a disability, but therefore cannot work and hence is not a qualified individual with a disability under the ADA; or alternatively, the courts may determine that the claimant can work, but is therefore not "substantially limited in working," and thus hold that the claimant does not have a disability under the ADA.[240]

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[229] *See* ibid.

[230] *See* Robert Silverstein, Director, Center for the Study and Advancement of Disability Policy Study, interview in Washington, Dec. 10, 1997, p. 3 (hereafter cited as Silverstein interview). Mr. Silverstein, a disability policy expert who served as counsel and principal advisor to Sen. Tom Harkin from 1987 to 1997 and as one of the drafters of the ADA statute and its legislative history, mentioned in this context, that during hearings and debates on the ADA bill, he had argued that "working" should not be considered a major life activity because of the potential confusion this might create. However, he was not successful in advancing this argument, and Congress included working as a major life activity in the final version of the ADA.

[231] EEOC, "Definition of the Term 'Disability'," § 902.4(c)(2).

[232] 95 F.3d 674, 677 (8th Cir. 1996). This ruling does not follow from the EEOC guidance which states that working should be considered as a major life activity only if no other major life activity is substantially limited. *See* EEOC, "Definition of the Term 'Disability'," § 902.4(c)(2).

[233] 1997 U.S. Dist. LEXIS 13313 (N.D. Ill. 1997).

[234] *Id.* at *12–*13.

[235] *See id.*

[236] 29 C.F.R. pt. 1630 app. § 1630.2(j) (1997) (emphasis added).

[237] Erickson, 1997 U.S. Dist. LEXIS 13313, at *12.

[238] Silverstein interview, p. 3.

[239] Ibid.

Mitigating Measures

In the past several years, a split has arisen in the Federal courts as to the meaning of disability under the ADA.[241] The controversy developed over whether an individual who is using corrective or mitigating measures, such as medication, to treat a condition has a disability within the meaning of the ADA. On one side are courts that have applied the "medicated test";[242] that is, they decided that a disability was not present because of mitigating measures available. On the other side are courts that argue, based on explicit intent in the statute's legislative history, that the disability determination under the ADA always must be made *without regard* to mitigating measures.[243]

In its 1995 guidance on the definition of disability under the ADA, EEOC states that mitigating measures should not be considered when determining whether an impairment limits a major life activity:[244]

> an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. . . . Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. . . .[245]

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[240] Ibid.

[241] The split is based on the issue of whether to determine disability with or without regard to mitigating measures. *See* Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (stating "analysis of whether [plaintiff] is disabled does not include consideration of mitigating measures") *cert. denied* 118 S.Ct. 693 (1998); Harris v. H & W Contracting Co., 102 F.3d 516, 520–21 (11th Cir. 1996) (holding EEOC's interpretation is consistent with the ADA's legislative history; thus, an individual's disability must be assessed without regard to mitigating measures). *But cf.* Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) ("EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives."); Coghlan v. H.R.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Texas 1994) (concluding that "EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation").

See also discussion below; James G. Frierson, "Medical Treatments Should Not be Considered When Courts Determine 'Disability' Under the ADA," *Employment Discrimination Report*, Feb. 4, 1998, pp. 166–70 (hereafter cited as Frierson, "Medical Treatments Should Not be Considered").

[242] *See* Cline v. For Howard Corp., 963 F. Supp. 1075, 1081 n. 6 (E.D. Okla. 1997) (recognizing split of authority and determining that "the better reasoned approach in the context of vision is one which evaluates the limitation with regard to the use and effectiveness of corrective devices"); Gaddy v. Four B Corp., 953 F. Supp. 331, 337 (D. Kan. 1997) ("EEOC Interpretive Guideline § 1630.2(j)'s pre-medicated perspective is in direct conflict with the ADA's express statutory language . . . . "); Moore v. City of Overland Park, 950 F. Supp. 1081, 1088 (D. Kan. 1996) (rejecting unmedicated perspective of § 1630.2(j) because it is in direct conflict with ADA); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) ("EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives."); Coghlan v. H.R.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Texas 1994) (concluding that "EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation"). *See also* Frierson, "Medical Treatments Should Not be Considered," p. 166.

[243] *See* Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (stating "analysis of whether [plaintiff] is disabled does not include consideration of mitigating measures"), *cert. denied* 118 S.Ct. 693 (1998); Harris v. H & W Contracting Co., 102 F.3d 516, 520–21 (11th Cir. 1996) (holding that EEOC's interpretation is consistent with the ADA's legislative history, thus, an individual's disability must be assessed without regard to mitigating measures); Fallocaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997) ("This Court finds that the EEOC's 'no mitigating measures' is eminently reasonable, consistent with the language and purpose of the Rehabilitation Act, and supported by the legislative history of the ADA.").

[244] EEOC, "Definition of the Term 'Disability'," § 902.5 (citing 29 C.F.R. pt. 1630 app. § 1620.2(j) (1997)); S. REP. NO. 101–116, at 23 (1989); H.R. REP. NO. 101–485(II), at 52 (1990); H.R. REP. NO. 101–485(III), at 28 (1990).

[245] 29 C.F.R. pt. 1630 app. § 1630.2(j) (1997) .

A senior attorney in EEOC's ADA Policy Division explained the analysis EEOC used in developing its position on mitigating measures.[246] Since the statute is silent on the issue, EEOC looked at the definition of "substantially limits" in the regulations. The regulations state that an impairment is substantially limiting if it significantly restricts the "condition, manner, or duration under which an individual can perform a particular major life activity."[247] A person who can perform a major life activity only with the aid of a "mitigating measure" is significantly restricted in the "condition, manner, or duration" with which he or she can perform that activity. Therefore, the individual would qualify as having a substantial impairment under the regulations. The EEOC attorney said that EEOC's position also came straight from the ADA legislative history, which said that the existence of a substantially limiting impairment should be assessed without regard to mitigating measures.[248]

Some courts continue to apply the "medicated test" to determine the presence of a substantial impairment. Citing to the statutory language,[249] these courts argue that having a disability within the meaning of the statute requires an actual, substantial limitation of a major life activity. These courts reason that if medical treatments mitigate the disability or its symptoms and remove the substantial limitation of a major life activity, then there is no disability and there is no need to review the case any further.[250]

EEOC's position that mitigating measures should not be considered when determining the presence of a disability has strong support in the legislative history of the ADA,[251] but it appears problematic for employers because, as one commentator has noted, "it suggests that one can be disabled under the first prong even if his condition is completely controlled."[252]

EEOC's interpretive guidance states that "a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication."[253] Disagreeing, some courts have found that such a statement assumes that the inability to perform major life activities without the aid of medication is not in and of itself evidence of a substantial limitation of a major life activity.[254] Moreover, EEOC has not explained what the substantial limitation is in situations in which a disability is controlled through mitigating measures. At least one recent case has not given effect to EEOC's position on mitigating measures in part because it was issued in an interpretive guidance and not as a substantive regulation or statutory provision.[255]

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[246] *See* Lyn McDermott, Senior Attorney, ADA Policy Division, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 6, 1998, p. 4 (hereafter cited as McDermott interview).

[247] 29 C.F.R. § 1630.2(j)(1)(ii) (1997).

[248] McDermott interview, p. 4.

[249] 42 U.S.C. § 12102(2) (1994).

[250] *See* Ellison v. Software Spectrum, Inc., 85 F. 3d 187, 191 n.3 (5th Cir. 1996) (noting that "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the *potential* to substantially limit a major life activity") (emphasis added); Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993) ("[A] person is not handicapped if his vision can be corrected to 20/200."), *cert. denied*, 511 U.S. 1011 (1994); Cline v. For Howard Corp., 963 F. Supp. 1075, 1080–81 n. 6 (E.D. Okla. 1997) (recognizing split of authority and determining that "the better reasoned approach in the context of vision is one which evaluates the limitation with regard to the use and effectiveness of corrective devices"); Gaddy v. Four B Corp., 953 F. Supp. 331, 337 (D. Kan. 1997) ("EEOC Interpretive Guideline § 1630.2(j)'s pre-medicated perspective is in direct conflict with the ADA's express statutory language . . . ."); Moore v. City of Overland Park, 950 F. Supp. 1081, 1088 (D. Kan. 1996) (finding that plain language of the ADA conflicts with the EEOC's Interpretive Guidance concerning premedicated perspective); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) ("EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that impairment 'substantially limits' their lives."); Coghlan v. H.R.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (concluding that "EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation").

[251] *See* S. REP. NO. 101–116, at 23 (1989); H.R. REP. NO. 101–485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (stating: "Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication."); H.R. REP. NO. 101–485(III), at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451 (stating: "The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation.").

[252] D'Agostino, *Defining "Disability" Under the ADA*, p. 5.

[253] 29 C.F.R. pt. 1630 app. § 1630.2(j) (1997).

[254] *See* Wilking v. Ramsey, 983 F. Supp. 848, 854 (D. Minn. 1997); Coghlan v. H.R.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994). *See also* discussion below.

In a recent case, *Wilking v. County of Ramsey*, a court in Minnesota held that because an employee's depression was controlled by medication, the depression did not substantially limit a major life activity and therefore the depression was not a covered disability.[256] Another example is the case of *Coghlan v. H.J. Heinz Company*, concerning a job applicant with diabetes.[257] The court rejected the EEOC interpretive guidance on substantial limitation, stating that:

> [the EEOC interpretive guidance] reads "limits" right out of the statute because an insulin-dependent diabetic who takes insulin could perform major life activities and would therefore not be limited. Because the EEOC [interpretive guidance] requires determination of "disability" regardless of an insulin-dependent diabetic's limitation, it is at odds with the statute. In other words, the EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation [to show disability].[258]

In another example, the Tenth Circuit rejected the EEOC guidance on mitigating measures in holding that twin sisters with near sightedness did not have a disability within the meaning of the ADA because their near sightedness, although a physical impairment, did not substantially limit them in the major life activity of seeing when they were wearing corrective lenses.[259] The claimants argued on appeal that the district court erred in evaluating their physical impairment *with regard* to the benefit of corrective eyewear, in direct contradiction to the EEOC interpretive guidance.[260] However, the appeals court upheld the decision of the district court in disregarding the EEOC guidance.[261] The Tenth Circuit stated that EEOC's interpretation was in direct conflict with the plain language of the ADA.[262] Moreover, the court stated, "we are concerned with whether the impairment affects the individual, in fact, not whether it would hypothetically affect the individual without the use of corrective measures."[263]

EEOC and courts on the other side of the argument rely on the "unmedicated test."[264] The "unmedicated test" is supported vigorously by disability rights advocates and some legal commentators. Included in this group are some of the actual drafters of the ADA statute and its legislative history. For example, an attorney and Georgetown University Law professor, who

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[255] *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 899 n.3 (10th Cir. 1997).

[256] 983 F. Supp. 848, 854 (D. Minn. 1997).

[257] Coghlan v. H.R.J. Heinz Co., 851 F. Supp. 808 (N.D. Tex. 1994).

[258] *Id.* at 813.

[259] Sutton at 902–03 (10th Cir. 1997).

[260] *Id.* at 896.

[261] *Id.* at 902–03. In disregarding the EEOC's interpretive guidance on the consideration of mitigating measures in determining whether a physical or mental impairment rises to the level of a disability within the meaning of the ADA, the *Sutton* court offered a rationale based on precedent: "It is well established that we must defer to the EEOC's regulatory definition unless it is 'arbitrary, capricious, or manifestly contrary to the statute.' (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). However, although we give great deference to the EEOC's interpretation of the ADA found in regulations promulgated under the express authority of Congress and the ADA itself, we do not do the same for interpretive guidance promulgated under the Administrative Procedure Act. (citing Headrick v. Rockwell Int'l Corp., 24 F.3d 1272, 1282 (10th Cir. 1994) (no special deference due to Department of Labor comment, which is a "purely interpretive rule") citing Chrysler Corp. v. Brown, 441 U.S. 281, 301–04 (1979) (explaining distinction between interpretive rules and substantive or legislative rules)). Hence, while the EEOC's Interpretive Guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference under *Chevron*." 103 F.3d at 899 n.3.

See also Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1444 (W.D. Wis. 1996) (citing Public Employees Retirement System v. Betts, 492 U.S.158, 171 (1989) ("Of course no deference is due to agency interpretations at odds with the plain language of the statute itself.")).

[262] Sutton, 130 F.3d 902.

[263] *Id.*. *See also* Murphy v. United Parcel Service, 1998 U.S. App. LEXIS 4439, *5–*6 (10th Cir. 1998) (holding that a former mechanic with high blood pressure does not have a disability under the ADA because his condition does not limit a major life activity when it is treated with medication).

[264] *See* Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 902–07 (E.D. Pa. 1997) (expressly adopting EEOC guidance); Sarsycki v. United Parcel Serv., 862 F. Supp. 336, 340 (W.D. Okla. 1994) (relying on EEOC interpretation as authoritative without discussion).

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worked on drafting the ADA and its legislative history, pointed out that a discussion clarifying that the presence of a disability should be assessed without mitigating measures was purposefully included in the ADA's legislative history. Furthermore, she added that real protection for individuals with disabilities in the workplace will require management lawyers to cease trying ADA cases on the issue of whether the plaintiff has a disability under the ADA statutory definition. Instead, she said, they should treat disability like other protected classifications, such as race and sex, and try the cases on the "real issue" of whether or not there was discrimination on the basis of disability.[265]

Another disability rights advocate who helped draft the ADA and its legislative history has stated that EEOC's policy guidance espouses positions consistent with the spirit and intent of Congress in enacting the ADA.[266] However, the courts are misinterpreting the ADA and "rewriting" legislative history.[267] He gave as an example the narrow, formulaic way in which courts have been interpreting the definition of "disability" under the ADA.[268] In addition to the views of these advocates, many courts are agreeing with EEOC's guidance.[269] For example, in *Wilson v. Pennsylvania State Police Department*,[270] the plaintiff filed a class action against Pennsylvania State officials, claiming that the officials violated the ADA and section 504 by rejecting candidates with myopia for the position of State trooper cadet. The defendants argued that the plaintiff was not substantially limited in seeing when his vision could be corrected by wearing eyeglasses or contact lenses.[271]

Citing the EEOC interpretive guidance on mitigating measures, the court stated that a threshold question raised by the defendant was whether or not the determination of "substantial limitation" should be made with regard to the plaintiff's use of eyeglasses or contact lenses.[272] The plaintiff argued that, under EEOC guidelines, the use of eyeglasses or contact lenses as mitigating measures should be disregarded in determining whether he was substantially limited by his myopia.[273] In holding for the plaintiff, the court relied on EEOC guidance, stating that employment decisions must be made without regard to mitigating measures.[274] Thus the court decided that a factual issue existed as to whether the applicant was substantially limited in his ability to see and, thus, whether he had a disability within the meaning of the ADA. Moreover, the court found factual issues existed as to whether the applicant was regarded as having a disability and as to whether he was otherwise qualified for the position.[275] In finding in favor of the plaintiff, the court noted:

> Defendant argues on the one hand that plaintiff's myopia is not limiting or unusual as compared with the general population, while arguing on the other hand that he does not have the requisite visual capacity to be a state trooper due to his poor uncorrected vision. There is a certain irony inherent in defendants' argument: if, by virtue of his glasses or lenses, plaintiff is not substantially limited in seeing, how can he nonetheless be too visually impaired—based on his eyes without correction—to satisfy the position of state trooper?[276]

The U.S. Court of Appeals for the Third Circuit has ruled that "mitigating measures" such as medication, used to alleviate physical or mental impairments, should not be considered in determining whether an individual has a disability under the ADA.[277] The Third Circuit joins several other Federal appeals courts that take EEOC's view that people who control their disabilities with medication or assistive devices are entitled to ADA coverage.[278]

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[265] Chai Feldblum, Professor of Law, Georgetown University Law School, Washington, DC, interview in Washington, DC, Feb. 2, 1998, pp. 3, 6 (hereafter cited as Feldblum interview).

[266] Silverstein interview, p. 3.

[267] Ibid.

[268] Ibid.

[269] *See* Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (stating "analysis of whether [plaintiff] is disabled does not include consideration of mitigating measures") *cert. denied*, 118 S. Ct. 693 (1998); Harris v. H & W Contracting Co., 102 F.3d 516, 520–21 (11th Cir. 1996) (holding EEOC's interpretation is consistent with the ADA's legislative history; thus, an individual's disability must be assessed without regard to mitigating measures); Fallocaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997) ("This Court finds that the EEOC's 'no mitigating measures' is eminently reasonable, consistent with the language and purpose of the Rehabilitation Act, and supported by the legislative history of the ADA."); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 902-07 (E.D. Pa. 1997) (expressly adopting EEOC guidance); Sarsycki v. United Parcel Serv., 862 F. Supp. 336, 340 (W.D. Okla. 1994) (relying on EEOC interpretation as authoritative without discussion).

[270] Wilson, 964 F. Supp. 898.

[271] *Id.* at 900.

[272] *Id.* at 902.

[273] *See* 29 C.F.R. pt. 1630 app. § 1630.2(j) (1997).

[274] *See* 29 C.F.R. app. § 1630.2(j) (1997).

[275] *See* Wilson, 964 F. Supp. at 909-13.

[276] *Id.* at 906.

EEOC also has advanced its position on mitigating measures as an *amicus curiae* in several cases.[279] For example, in *Arnold v. United Parcel Service*,[280] EEOC argued that the body of legal authority, including the legislative history of the ADA, interpretive guidance issued by the agencies charged with interpretation of the ADA statute, and decisions of other courts of appeals, "all support the conclusion that medication and other mitigating measures should not be considered in determining whether an individual has a 'disability' within the meaning of the statute."[281] EEOC's brief also observed that *Harris v. H & W Contracting Company*[282] provided particularly strong support for EEOC's position. In *Harris*, the Eleventh Circuit explored the issue in some depth and concluded that whether the plaintiff's Grave's disease substantially limited a major life activity should be assessed without regard to mitigating measures.[283]

In another case in which EEOC participated as an *amicus curiae*, *Ferguson v. Western Carolina Regional Sewer Authority*,[284] the agency offered another strong argument as to why mitigating measures should not be included in any assessment of disability under the act. If disability is determined based on mitigating measures:

> many individuals with substantially limiting impairments will not be able to demonstrate that they have a "disability" within the scope of ADA coverage because medical treatment or assistive devices mitigate the limitations caused by their impairments. Congress did not intend that the very medical advance that may render an individual with an otherwise limiting impairment "qualified" to work, enabling her full participation in the workforce, would be the basis for excluding her from the ADA's protections against discrimination based on her impairment. Unless the determination of "disability" is made without regard to mitigating measures, many individuals whom the statute was designed to protect will be excluded from coverage and will remain subject to precisely the type of discriminatory treatment Congress sought to prevent.[285]

EEOC adds that in its interpretive guidance to its title I regulations, the agency states "the existence of an impairment" and "whether an individual is substantially limited in a major life activity" are to be determined "without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[286] EEOC's *Ferguson amicus* brief then argues that U.S. Supreme Court precedent requires that a court give "substantial deference" to an agency's interpretation of its own regulations and this interpretation "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."[287] In addition, a court "must defer" to an agency's interpretive guidance "unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation."[288]

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[277] Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937 (3rd Cir. 1997).

[278] *See* Arnold v. United Parcel Service, 136 F.3d 854, 866 (1st Cir. 1998); Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).; Harris v. H & W Contracting Co., 102 F.3d 516, 520–21 (11th Cir. 1996).

[279] *See, e.g.*, Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933 (3rd Cir. 1997); Arnold v. United Parcel Service, 136 F.3d 854 (1st Cir. 1998). *See also* Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae* at 1–2, Ferguson v. Western Carolina Regional Sewer Auth., 104 F.3d 358, 1996 U.S. App. LEXIS 37998 (4th Cir. 1996) (No. 96–1277).

[280] Arnold, 136 F.3d 854.

[281] Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae* at 7, Arnold, 136 F.3d 854 (No. 97–1781). *See* H.R. Rep. No. 485 (II) at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 . *See also* S. Rep. No. 116 at 23 (1989); H.R. Rep. No. 485 (III) at 28–29 (1990) (whether impairment substantially limits major life activity should be determined "without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation"), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; 29 C.F.R. Pt. 1630, app. §§ 1630.2(h) (impairment) & (j) (substantially limits) (EEOC guidance). *Accord* 28 C.F.R. pt. 36, app. B § 36.104 (DOJ guidance).

[282] 136 F.3d 854 (11th Cir. 1996) (No. 97–1081).

[283] *See id.* at 521.

[284] 1996 U.S. App. LEXIS 33875 (4th Cir. 1996).

[285] Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* at 9, Ferguson, 1996 U.S. App. LEXIS 33875 (No. 96–1277).

[286] 29 C.F.R. Pt. 1630 app. §§ 1630.2(h) (physical or mental impairment) and 1630.2(j) (substantially limits) (1997).

[287] Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (internal quotation marks omitted).

Despite the persuasive arguments of EEOC and a number of the Federal appellate courts, courts and commentators continue to argue fiercely about mitigating measures. Both sides have found substantial support in the caselaw.[289] However, courts following the "medicated test" may be far too concerned with the "plain language of the statute," to the exclusion of other important factors.[290] One commentator has argued that with the "medicated test" courts have not used the proper factors in interpreting statutory language.[291] The commentator noted that in *Robinson v. Shell Oil*,[292] the U.S. Supreme Court stated that the plainness or ambiguity of statutory language "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[293] The commentator argues that the broader context of the statute as a whole makes the language "substantially limits one or more of the major life activities" seem ambiguous at first.[294]

This ambiguity is evident in a number of sources. First, in the findings and purposes section of the ADA, Congress found that some 43 million Americans had a physical or mental disability. However, statistics available to Congress when it passed the ADA showed that only 9.5 million Americans experienced actual difficulty in performing life activities. Congress' use of the larger figure indicates "at the least, that the extent of people defined as disabled under the ADA is unclear. At the most, it proves that Congress intended that the EEOC's unmedicated test be used to determine disability."[295]

Both House and Senate reports accompanying the ADA bill support the unmedicated test and EEOC's interpretive guidance. Both state that whether a person has a disability should be assessed without regard to the availability of mitigating measures.[296] Also, the ADA specifically includes former users of illegal drugs who have been successfully rehabilitated.[297] It is not reasonable to conclude, as users of the medicated test so often have, that Congress intended to include former drug users, but not people who have a history of controlled diabetes, epilepsy, or other serious, chronic illnesses.[298]

Further, EEOC's position on mitigating measures still applies the "substantial limitation" requirement. EEOC has stated that the term "substantial limitation" means that an individual is "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[299] An individual who cannot breathe without asthma medication or hear without a hearing aid is significantly restricted in the manner in which he or she performs these activities as compared to the manner in which the average person performs them. As one court has written:

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[288] *Id.* (internal quotation marks omitted).

[289] *See* Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, (3rd Cir. 1997) (mitigating measures should not be considered in the determination of whether an impairment is covered under the ADA); Gilday v. Mecosta County, 124 F.3d 760, 765 (agreeing with EEOC's position on mitigating measures); Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998); Harris v. H & W Contracting Co., 102 F.3d 516, 520–21 (11th Cir. 1996). *But see* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (stating that EEOC's interpretation was in direct conflict with the plain language of the ADA); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1444 (W.D. Wis. 1996) ("Of course no deference is due to agency interpretations at odds with the plain language of the statute itself.") (citing Public Employees Retirement System v. Betts, 492 U.S.158, 171, 106 L. Ed. 2d 134, 109 S. Ct. 2854 (1989)); Coghlan v. H.R.J. Heinz Co., 851 F. Supp. 808, 811–12 (N.D. Tex. 1994); Murphy v. United Parcel, Serv., Inc., 946 F. Supp. 872, 881 n.1 (D. Kan. 1996) (rejecting EEOC view as contrary to statute).

[290] James G. Frierson, "Medical Treatments Should Not Be Considered When Courts Determine 'Disability' Under ADA," *Employment Discrimination Report (BNA)*, vol. 10 (Feb. 4, 1998), p. 167 (hereafter cited as Frierson, "Medical Treatments Should Not Be Considered").

[291] Ibid.

[292] 117 S. Ct. 843 (1997).

[293] *Id.* at 846.

[294] Frierson, "Medical Treatments Should Not be Considered," p. 167.

[295] Ibid.

[296] H.R. REP. NO. 101–485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; S. REP. NO. 101–116, at 23 (1989).

[297] 42 U.S.C. § 12114(b) (1994).

[298] Frierson, "Medical Treatments Should Not be Considered," p. 169.

[299] 29 C.F.R. § 1630.2(j)(1)(ii) (1997).

> A person with a serious disability who depends on medicine or a medical device to ameliorate the effects of that disability nonetheless has a limit on a major life activity: without the corrective measure the person would be unable to perform a major life activity. . . . An average person does not need to wear a hearing aid as a precondition to hearing a conversation, and a person who does require one may therefore be significantly limited in the major life activity of hearing.[300]

Another argument advanced against the medicated test has been that it produces illogical results that defy common sense.[301] For example, applying a test that benefits people who have failed to seek treatment for a medical impairment while harming those who have, more responsibly, sought treatment, does not make sense.[302] Secondly, the medicated test creates a "heads you lose, tails you lose" situation in which individuals cannot prevail in an ADA claim unless they show actual substantial limitation of major life activity; however, substantial limitation then can be used to show that the individual is not qualified.[303] A good example is a person seeking a position as a truck driver who has controlled his diabetes with insulin.[304] He cannot win under the medicated test because he has no actual substantial limitation.[305] On the other hand, if the individual has not controlled his diabetic condition, he is not qualified to drive safely because of the danger his uncontrolled diabetes causes.[306]

To date, EEOC's efforts in strengthening its position on mitigating measures and working to ensure that it prevails in the courts have been somewhat limited. For example, EEOC has not issued guidance on mitigating measures in the form of a substantive regulation, which would carry substantially more legal weight and would require the courts' deference;[307] nor has EEOC addressed the issue in a comprehensive policy guidance that provides a careful, thoroughly developed rationale explaining EEOC's position as it has done for other discrete topics and issues, such as psychiatric disabilities and the effects of representations made in disability benefits claims on ADA claims. However, EEOC has addressed the mitigating measures issue in significant ways in its enforcement guidance on other title I issues and in its litigation and *amicus curiae* briefs. EEOC has also continued its program of technical assistance, outreach, and education with members of the Federal judiciary and the private bar explaining its interpretation of mitigating measures under the first prong of the ADA's definition of disability.[308]

The Federal Judicial Center (FJC), a judicial branch agency principally responsible for providing training to newly appointed Federal judges, has done training on employment law for Federal judges[309] on a fairly frequent basis.[310]

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[300] Gilday v. Mecosta County, 124 F.3d 760, 763 (6th Cir. 1997).

[301] Frierson, "Medical Treatments Should Not be Considered," p. 169.

[302] Ibid.

[303] Ibid.

[304] Ibid.

[305] Ibid.

[306] Ibid.

[307] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (stating that EEOC guidelines "while *not controlling* upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (emphasis added and internal quotations omitted).

See also Feldblum interview, p. 5. Feldblum stated that EEOC also could do more to address these issues. For example, EEOC could issue substantive regulations on certain issues. EEOC could take issues such as mitigating measures; major life activities, including a specific list; the analysis relating to the major life activity of working; and the "regarded as" prong and place them in regulations. Such regulations would carry more legal weight than the current policy guidance. *See also* Michelle Martin, Staff Services Analyst, Department of Rehabilitation, State of California Health and Welfare Agency, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, attachment, p. 6 (stating: "inconsistencies at the Appeals Court level demand substantive regulations be issued. It is very difficult to provide technical assistance to callers who are concerned about mitigating measures, because as it stands right now, it is subject to the whim of the court.").

[308] Charles S. Arberg, Acting Director, Judicial Education Division, Federal Judicial Center, telephone interview, May 8, 1998, p. 2.

[309] Ibid.

[310] Ibid.

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The FJC provides a session on discrimination litigation that includes a discussion on the ADA.[311] The acting director of the FJC judicial education division has noted that EEOC's Associate Legal Counsel has spoken at a number of the center's sessions on employment law[312] and has provided helpful written materials for the participating judges.[313] The center contemplates that the Associate Legal Counsel will continue to appear at its workshops.[314]

Medical conditions that are being treated, such as diabetes, are covered under the third prong of the ADA definition of disability. The Senate Committee on Education and Labor report accompanying the 1989 ADA bill explicitly states that the third prong is intended to protect persons with medical conditions that are under control:

> other examples of individuals who fall within the "regarded as" prong of the definition include people who are rejected for a particular job for which they apply because of findings of a back abnormality on an x-ray, notwithstanding the absence of any symptoms, or people who are rejected for a particular job solely because they wear hearing aids, even though such people may compensate substantially for their hearing impairments by using their aids, speechreading, and a variety of other strategies.[315]

The report states further that "individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation."[316]

A further problem confronting ADA plaintiffs related to the medicated test is that courts, finding that no disability exists because there is no substantial limitation of a major life activity, use that holding of "no disability" within the meaning of the ADA to find that the employer could not regard the claimant as having a disability. Essentially, these courts are importing the whole analysis from the first prong and using it on the third prong.[317] As a result, no "actual" disability means no "perceived" disability either.[318]

Per Se Disabilities

The interpretive guidance accompanying the regulations states that "[o]ther impairments, however, such as HIV infection, are inherently substantially limiting."[319] EEOC's policy guidance on the definition of disability states: "in very rare instances, impairments are so severe that there is no doubt that they substantially limit major life activities. In those cases, it is undisputed that the complainant is an individual with a disability."[320] Thus, EEOC's guidance appears to indicate that for these conditions, disability is "inherent," which may reasonably be interpreted to mean that EEOC is suggesting that there is not a requirement to show substantial limitation in all cases.[321] However, EEOC's Associate Legal Counsel has stated that, in general, the agency's position is that the appropriate legal analysis should be done to determine if an impairment is substantially limiting.[322] Nonetheless, ambiguous language in EEOC's guidance documents, such as EEOC's interpretive guidance on the ADA, may undercut this prudent position. In effect, EEOC's guidance relating to such inherently disabling conditions may contradict the ADA's substantial limitation requirement.

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[311] Ibid.

[312] Ibid.

[313] Ibid.

[314] Ibid.

[315] H.R. REP. NO. 101–116, at 24 (1989).

[316] Ibid.

[317] *See, e.g.*, Runnebaum v. NationsBank, 123 F.3d 156, 172–74 (4th Cir. 1997). *See also* Feldblum interview, p. 5. Ms. Feldblum stated that another problem is with the courts' reading of the third prong of the disability definition, which covers people who are "regarded as having" a disability. The problem here is that courts simply are importing the substantial limitation test from the first prong. Claimants under the third prong therefore are required to show that they were perceived or regarded as having an impairment that substantially limited a major life activity.

[318] Frierson, "Medical Treatments Should Not be Considered," p. 169.

[319] 29 C.F.R. pt. 1630 app. § 1630.2(j) (1997).

[320] EEOC, "Definition of the Term 'Disability'," § 902.4(c).

[321] *See* EEOC, "Definition of the Term 'Disability'," § 902.4. *See also* EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at T–II (January 1992).

[322] Mastroianni interview, p. 5. According to the Associate Legal Counsel, EEOC's position is that one always should do the analysis (determine whether the person has a disability according to the language of the statute, i.e., substantial limitation of a major life activity), because it is very important in litigating ADA cases. Although she noted that, in general, EEOC's position is that one should do the analysis required under the statute, EEOC is aware there is legislative history and court rulings supporting the proposition that some disabilities are inherently substantially limiting. She reiterated, however, that EEOC always does the required analysis, because the statute requires it.

The interpretive guidance does not provide a "laundry list" of impairments that constitute disabilities because "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[323] As with its commentary on mitigating measures, the guidance appears somewhat contradictory in that, on the one hand, it states that the determination of whether an individual has a disability is based on the effect the disability has on the individual's life, while, on the other hand, the guidance states that some impairments, such as HIV infection, are inherently substantially limiting.[324]

It is thus unclear in the interpretive guidance whether claimants are required to show substantial limitation, which the statute and the regulations clearly require. Elsewhere in its policy guidance on the definition of disability, EEOC reiterates its position that some impairments are inherently substantially limiting which would mean that they bypass a formal substantial limitation inquiry. The guidance states: "In very rare instances, impairments are so severe that there is no doubt that they substantially limit major life activities. In those cases, it is undisputed that the complainant is an individual with a disability."[325]

The guidance mentions insulin-dependent diabetes, manic depression, and alcoholism as impairments that courts have ruled inherently disabling.[326] However, it does not mention cases that have held specific illnesses are not disabilities. For example, in the case of insulin-dependent diabetes, at least one court has held that, with successful insulin treatment, insulin-dependent diabetes is not a disability at all.[327] As one commentator has observed, some courts have rejected the language referring to "*per se* disabilities" because they have determined that it "effectively negates the statutory requirement that one must be substantially limited in order to be covered."[328]

EEOC's interpretive guidance states that "[o]ther impairments, however, such as HIV infection, are inherently substantially limiting."[329] In addition, in its enforcement guidance on the definition of disability, EEOC concludes that HIV infection, including asymptomatic HIV infection, is "inherently" disabling.[330] As support for this statement, EEOC's enforcement guidance cites two court cases,[331] the ADA's legislative history (in which HIV infection, both symptomatic and asymptomatic, as a disability is addressed specifically),[332] and a 1988 Justice Department memorandum on the application of section 504 of the Rehabilitation Act to HIV-infected individuals.[333] The ADA legislative history documents cite the same memorandum.[334] However, the DOJ memorandum argues that HIV infection, even if it is asymptomatic, is a disability within the meaning of the statute, not because it is *inherently* substantially limiting, but because it substantially limits one in the ability to reproduce. EEOC, however, has not mentioned reproduction as the major life activity limited by HIV infection. Rather, EEOC has said only that HIV infection is "inherently substantially limiting."

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[323] 29 C.F.R. pt. 1630 app. § 1630.2(j) (1997).

[324] *Id.*

[325] *See* EEOC, "Definition of the Term 'Disability'," § 902.4(c). Impairments that courts have ruled inherently disabling include insulin-dependent diabetes, legal blindness, deafness, manic depressive illness, alcoholism, and HIV infection, including asymptomatic HIV illness. *See also* The Equal Employment Opportunity Commission has taken the same position under title I of the ADA. See EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at T–II (January 1992) ("Some impairments, such as blindness, deafness, HIV infection or AIDS, are by their nature substantially limiting").

[326] EEOC, "Definition of the Term 'Disability,'" § 902.4(c).

The enforcement guidance states that some "impairments are so severe that there is no doubt that they substantially limit major life activities." Ibid. Thus, the guidance states that under the Rehabilitation Act courts accepted with little or no discussion that a person was an individual with a disability when the impairment was insulin-dependent diabetes, Bentivegna v. United States Dept. of Labor, 694 F.2d 619, 621 (9th Cir. 1982); legal blindness, Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985); manic depressive syndrome, Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985); deafness, Davis v. Frank, 711 F. Supp. 447, 453 (N.D. Ill. 1989); and alcoholism, Whitlock v. Donovan, 598 F. Supp. 126, 129 (D.D.C. 1984), *aff'd sub nom.* Whitlock v. Brock, 790 F.2d 964 (D.C. Cir. 1986). Ibid.

[327] *See* Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) ("EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives").

[328] D'Agostino, *Defining "Disability" Under the ADA*, p. 5. The same inconsistency appears in the EEOC guidance on the definition of disability. In a footnote, EEOC states that with regard to HIV infection, "[t]he fact that a contagious disease is an impairment does not automatically mean that it is a disability. To be a disability, an impairment must substantially limit (or have substantially limited or be regarded as substantially limiting) one or more major life activities." EEOC, "Definition of the Term 'Disability'," § 902.2(d), n. 17. EEOC seemingly deemphasizes the substantial limitation requirement by declaring that based on the legislative history "[a]n individual who has HIV infection, including asymptomatic HIV infection, has a disability covered under the ADA." *Id.* n. 18.

[329] 29 C.F.R. pt. 1630 app. § 1630.2(j) (1997).

In June 1998, the Supreme Court decided the case of *Bragdon v. Abbott*. In *Bragdon*, a patient had sued her dentist for refusing to treat her because she was HIV positive. The plaintiff prevailed at both the district and appeals court levels on her argument that she is disabled under the ADA because she has a physical impairment, HIV infection. She maintained that her impairment constitutes a disability within the meaning of the act because she is substantially limited in the major life activity of reproduction.[335] In a 5–4 decision, the Supreme Court held that "HIV infection, even in the so-called asymptomatic phase, is an impairment which substantially limits the major life activity of reproduction."[336] While relying on the EEOC's interpretive guidance that HIV is inherently substantially limiting, the Supreme Court declined to decide whether HIV constitutes a *per se* disability under the ADA.[337]

EEOC's interpretive and policy guidance relating to *per se* disabilities under the first prong appears directly at odds with some recent court decisions. Some courts have rejected the language in EEOC's guidance stating "[o]ther impairments, however, such as HIV infection, are inherently substantially limiting," because they have determined that it effectively negates the statutory requirement that one must be substantially limited in order to be covered, thus creating a category of *per se* disabilities that arguably do not require the analysis indicated in the ADA's definition of disability.[338] Thus, EEOC's guidance relating to *per se* disabilities under the first prong appears directly at odds with these recent court decisions.

As of July 1998 EEOC had not issued new policy guidance or substantive regulations clarifying its position on *per se* disabilities. Specifically, EEOC has not addressed the apparent contradiction noted by recent court decisions relating to whether the requirement for a showing of substantial limitation can be waived for some disabilities as EEOC appears to state in its interpretive and enforcement guidance.[339]

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[330] EEOC, "Definition of the Term 'Disability'," §§ 902.4(c), 902.2(d), n. 18. In the case of *Doe v. Kohn Nast & Graf, P.C.*,a court agreed that HIV infection was a disability under the statute because it substantially limited the major life activity of procreation. 862 F. Supp. 1310, 1320 (E.D. Pa. 1994). The same result obtained in *Abbott v. Bragdon* in which the First Circuit held that a dentist violated title III of the ADA by refusing to treat a patient with HIV. 107 F.3d 934, (1st Cir. 1997) *cert. granted*, 118 S. Ct. 554 (1997).

[331] *See* Doe v. Kohn Nast & Graf, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994); Doe v. District of Columbia, 796 F. Supp. 559 (D.D.C. 1992).

[332] *See* discussion above. *See also* H.R. REP. NO. 101–495(II), at 52 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303, 304. The report states: "Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication."

[333] *See id.* (citing Kmiec memorandum at 9–11). This document states that HIV is covered under the first prong of the disability definition because of a substantial limitation to procreation and intimate sexual relationships.

[334] *Id. See also* H. REP. NO. 101–485(III), at 28 (1990) *reprinted in* 1990 U.S.C.C.A.N. 445, 451 (citing Kmiec memorandum at 9–11).

[335] *Id.* at 939.

[336] Bragdon v. Abbott, No. 97–156, slip op. at 21 (U.S. June 25, 1998).

[337] *Id.* at 15.

[338] Runnebaum v. NationsBank, 123 F.3d 156, 168 (4th Cir. 1997) and Ennis v. Natl. Assn. of Business and Education Radio, Inc., 53 F.3d 55, 60 (4th Cir. 1995).

[339] 29 C.F.R. pt. 1630 app. § 1630.2(j) (1997); EEOC, "Definition of the Term 'Disability'," § 902.4(c).

On this issue, EEOC's Associate Legal Counsel stated that EEOC's position is that the analysis should be done (determine whether the person has a disability according to the language of the statute, i.e., substantial limitation of a major life activity), because the statute itself does not take a *per se* approach.[340] On the other hand, as noted earlier, there is legislative history that says asymptomatic HIV is covered as inherently substantially limiting and the courts have found that other impairments (insulin-dependent diabetes, alcoholism, manic depression) are covered as inherently disabling.[341] The Associate Legal Counsel said that she does not believe EEOC will address the issue "because there is nothing EEOC can add to the debate."[342]

Although a claimant cannot show an *actual* substantial limitation, under the third prong, the claimant may argue a *perceived* substantial limitation, thus avoiding the *per se* issue. With regard to the third prong (that an employee is regarded as having a physical or mental impairment), the House Judiciary Committee report indicates that the claimant does not necessarily need to show that the employer perceived him or her as having a substantial limitation.[343] Rather, the employer's adverse action against the employee may be evidence of a substantial limitation created not by an impairment itself but by the effect of negative myths, fears, stereotypes, or other stigma associated with disability. The focus, therefore, would be on the employer's perception of a disability and not on the substantial limitation requirement, as is the case under the first prong.[344]

In *Runnebaum v. NationsBank,*[345] the plaintiff argued that NationsBank regarded him as being disabled and therefore he had a claim under the third prong of the ADA's disability definition. However, the court found that the employees who were aware of Runnebaum's HIV status were not relevant decisionmakers and that Runnebaum presented no persuasive evidence that bank supervisors regarded him as having an impairment that substantially limited a major life activity.[346] The court concluded that "[q]uite simply, Runnebaum did not hold himself out to NationsBank as having an impairment that substantially limited one or more of the major life activities, NationsBank did not regard or perceive Runnebaum as having such an impairment, and the record does not contain evidence demonstrating otherwise."[347]

In this case, the court ignored the possibility that Runnebaum's employers' perception of his HIV infection may have been influenced by the kind of negative attitudes that the ADA seeks to protect against and focused on the requirement that the disability be substantially limiting to a major life activity.[348] However, since it was conducting a third-prong analysis, the court might have considered whether the negative reactions including myths, fears, and stereotypes associated with HIV infection may have created a substantial limitation to working for the claimant.

The *Runnebaum* court's third-prong analysis exemplifies a problem that has developed in title I interpretation: under the third prong, must a claimant show that his or her perceived condition or impairment is one that "substantially limits a major life activity"?[349] In the case of disabilities such as asymptomatic HIV infection, under-control diabetes, and others that have been the subject of dispute under the first prong on whether they actually create substantial limitations on major life activities, some courts, like *Runnebaum*, that have found no disability under the first prong, have taken this finding and applied it to the third prong. This analysis assumes that if the condition does not substantially limit a major life activity in fact, it cannot be perceived as such.[350] One commentator has described this reasoning in the following way:

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[340] Ibid.

[341] Ibid. *See, e.g.*, 135 CONG. REC. S10768 (daily ed. Sept 7, 1989) (statement of Sen. Kennedy).

[342] Mastroianni interview, p. 5.

[343] The report states, "a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field *and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.*." H.R. REP. NO. 101–485(III), at 30 (1990) *reprinted in* 1990 U.S.C.C.A.N. 445, 453.

[344] EEOC, "Definition of the Term 'Disability'," § 902.8(a). Under the third prong, EEOC's interpretive guidance states that if an employer discharged an employee in response to a rumor that the employee was HIV positive, regardless of whether the rumor was unfounded and the individual had no impairment at all, the individual would be considered as having a disability because the employer perceived this individual as being disabled. Thus, by discharging this employee, the employer would be discriminating on the basis of disability. 29 C.F.R. pt. 1630 app. § 1630.2(l) (1997). Similarly, EEOC policy guidance describes an individual who is rejected for employment because the employer erroneously believed the person had HIV infection. The guidance states that "[e]ven though the individual has no impairment, (s)he is regarded as having a substantially limiting impairment." EEOC, "Definition of the Term 'Disability'," § 902.8(e).

[345] Runnebaum v. NationsBank, 123 F.3d 156, 168 (4th Cir. 1997).

[346] *Id.* at 173–74.

[347] *Id.* at 174.

[348] *See id.* at 173–74.

> Most courts . . . finding no current, substantial limitation of a major life activity have also found that since the individual's medical impairment was not a disability, an employer who discriminates based on the impairment cannot be said to have regarded the impairment as a disability. In other words, if medicine controls an individual's epilepsy so that the individual is not disabled, then discrimination by an employer against the individual based on the diagnosis of epilepsy is not "regarding the individual as being disabled" since the epilepsy is not a disability.[351]

Under the third prong, it matters only that the employer perceived that the claimant *had* the condition or illness, not whether the condition would be considered a disability as defined by the formulaic requirement of a "substantial limitation on a major life activity." This is made clear in the ADA's legislative history. The House Judiciary Committee report accompanying the ADA bill shows how Congress viewed the third prong:

> a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employers perception was shared by others in the field and *whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition*.[352]

EEOC's regulations are consistent with congressional intent with respect to *per se* or "regarded as" disabilities. The regulations state that someone regarded as having an impairment means: (1) having a physical or mental impairment that does not substantially limit major life activities but being treated by a covered entity as having such a limitation; (2) having a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others; or (3) having none of the impairments defined in the act but being treated by a covered entity as having a substantially limiting impairment.[353]

Guidance on Determining Who Is a Qualified Individual with a Disability

As of July 1998, EEOC had not issued enforcement guidance on the meaning of "qualified individual with a disability" and related terms, such as "reasonable accommodation" and "essential function." The agency, however, was developing guidance on this topic.[354] Although there is no comprehensive guidance yet, EEOC has relied on the ADA itself, its legislative history, and caselaw under both ADA and section 504 in addressing this topic extensively in its regulations, the interpretive appendix to its regulations, its technical assistance manual, and other enforcement guidance.

Qualifications Standards

An analysis of the term "qualified individual with a disability" requires an understanding of the broader context in which Congress was working when it was developing the ADA. Two main interest groups sought to establish a compromise in the bill: employers and businesses, and disability rights advocates. The final ADA it is very much a compromise.

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[349] A senior attorney in the ADA Policy Division explained that since the statutory requirement is that for an individual to be covered under the third prong, he or she must be regarded as having "such an impairment," the individual must be regarded or perceived as having a disability that "substantially limits a major life activity." However, she said that the courts would look at the employer's treatment of the employee. If the employer treats the employee as substantially limited in a major life activity, the employee would be covered under the third prong. In this regard, she said, "an employer's actions speak louder than words." McDermott interview, p. 3.

[350] *See* Chai R. Feldblum, Professor of Law, Georgetown University Law School, interview in Washington, Feb. 2, 1998 (hereafter cited as Feldblum interview). Professor Feldblum stated that a problem with the courts' reading of the third prong of the disability definition that covers people who are "regarded as having" a disability is that courts simply are importing the substantial limitation test from the first prong. Claimants under the third prong, therefore, are required to show that they were perceived or regarded as having an impairment that substantially limited a major life activity.

[351] Frierson, "Medical Treatments Should Not Be Considered," p. 169.

[352] H.R. REP. NO. 101–485(III), at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 453 (emphasis added).

[353] 29 C.F.R. § 1630.2(1) (1997).

[354] *See* Mastroianni interview, p. 2; Miller interview, p. 2.

The ADA attempts to strike a careful balance between the employer's and the employee's interests. It does so in part by requiring that an employee with a disability be capable of performing the essential functions of the job. Under title I of the ADA, the employee is required to demonstrate that he or she is qualified, notwithstanding a disability, to perform, with or without reasonable accommodation, the essential functions of the job he or she holds or is seeking to fill.[355] The ADA identifies as discrimination the failure to provide reasonable accommodation for a known disability of an applicant or employee who can perform the essential functions of the job.[356] In addition, the ADA states that employers may not use qualifications standards, tests, or other criteria that screen out or tend to screen out individuals with disabilities, unless they can show that such selection criteria are job related and consistent with business necessity.[357] Employers are not required to provide reasonable accommodation under several circumstances, for example, if the employer can show that an individual with a disability poses a direct threat to other individuals[358] or that providing reasonable accommodation would impose undue hardship on the employer.[359]

The standards for determining who is qualified, the provision of reasonable accommodation, and the employer defenses of direct threat and undue hardship illustrate the careful balance between the rights of the employee with a disability and the rights of the employer. This balancing of interests is evident in the legislative history of the statute. The Senate Labor and Human Resources report accompanying the ADA states:

> By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose and effect of subjecting a qualified individual with a disability to discrimination. . . . Thus, under this legislation, an employer is still free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability.[360]

The House Committee on Education and Labor report accompanying the ADA bill further demonstrates a balancing of interests by offering specific scenarios and their outcomes under the ADA. For example:

> suppose an employer has an opening for a typist and two persons apply for the job, one being an individual with a disability who types 50 words per minute and the other being an individual without a disability who types 75 words per minute, the employer is permitted to choose the applicant with the higher typing speed if typing speed is necessary for successful performance of the job.[361]

The House report observes that if the two individuals in the example above had the same typing speed, but one had a hearing impairment that required a telephone headset with an amplifier and the other had no disability, the ADA would not permit the employer to choose the individual without a disability merely because the employer did not want to make reasonable accommodation for the person with a disability.[362] The House report notes however, that the employer "would be permitted to reject the applicant with a disability and choose the other applicant for reasons not related to the disability or accommodation or otherwise."[363] Finally the report clarifies that the employer's obligation under title I is:

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[355] 42 U.S.C. § 12111(8) (1994).

[356] *Id*. at § 12112(b)(5)(A). In addition, the ADA states that it is a form of discrimination to deny "employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant." *Id. at* 12112(b)(5)(B).

[357] *Id*. at 12112(b)(6). See also 29 C.F.R. § 1630.2(l) (1997).

[358] *Id*. at 12113(b).

[359] *Id*. at 12112(b)(5)(A).

[360] S. REP. NO. 101–116, at 26 (1989).

[361] H.R. REP. NO. 101–485(II), at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338.

[362] Ibid.

[363] Ibid.

to consider applicants and make decisions without regard to an individual's disability, or the individual's need for reasonable accommodation. But, the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.[364]

Two major issues must be addressed in determining whether an individual is covered under the ADA: whether the individual has a disability within the meaning of the act,[365] and whether the individual is qualified to perform the essential functions of the job.[366] The balance between employers' interests and employees' or applicants' interests is not always easily preserved. The rights of the employee with a disability under the ADA can be denied. Recent trends in the courts suggest that "if a plaintiff who suffered discrimination is healthy enough to perform the job, he or she is not disabled and cannot sue under the ADA; however, if a plaintiff proves an impairment is severe enough to be a disability, he or she is not qualified for the job."[367]

Defining "Qualified Individual with a Disability"

The ADA defines the term "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[368] The ADA's definition of "qualified individual with a disability" is complex and somewhat ambiguous. Contained within this term are other key terms, i.e., "reasonable accommodation," and "essential function," the definitions of which also must be interpreted by EEOC and the courts.[369]

EEOC's title I regulations define a "qualified individual with a disability" as one who "satisfies the requisite skill, experience, education, and other job-related requirements of the employment position."[370] In its interpretive guidance, EEOC has identified two criteria a claimant must address in showing that he or she is a qualified individual. The first is that the individual must demonstrate that he or she has "the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc."[371] The second criterion is that the individual must be able to "perform the essential functions of the position held or desired, with or without reasonable accommodation."[372]

Thus, an analysis of both "essential function" and "reasonable accommodation," as they apply to an individual situation, is necessary in determining whether an ADA claimant is qualified for the position held or desired. However, there is no way to ensure that both elements of the analysis will be accorded equal weight. As one commentator has noted:

> The determination of who is qualified is thus intertwined with the calculation of what is a reasonable accommodation . . . This definitional circularity has led to variances in judicial outcome depending on whether a court focuses primarily on a handicapped individual's ability to perform the position's essential functions or on the availability of reasonable accommodation to assist the individual's performance.[373]

The confusion among the courts on certain key terms and issues relating to these topics, particularly essential function and reasonable accommodation, suggests the need for guidance on the "qualified individual with a disability" as a protected class and concomitant issues. EEOC has addressed the term "qualified individual with a disability" extensively in its regulatory and interpretive guidance on title I.[374] However, EEOC has not yet published comprehensive policy documents on the "definition of qualified individual with a disability," "reasonable accommodation," and "undue hardship,"[375] although it is developing guidance on the first two concepts.[376]

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[364] Ibid.

[365] 42 U.S.C. § 12102(2) (1994).

[366] *Id.* at § 12111(9).

[367] James G. Frierson, "Heads You Lose, Tails You Lose: A Disturbing Judicial Trend in Defining Disability," *Labor Law Journal*, vol. 43 (July 1997), p. 419.

[368] 42 U.S.C. § 12111(8) (1994).

[369] For example, Congress did not provide specific criteria for what constitutes a "reasonable accommodation." Examples of reasonable accommodations provided in the legislative history include: making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, and the provision of qualified readers or interpreters. *Id.* at § 12111(9) (1994). *See generally* chap. 5 for further discussion on the term "qualified individual with a disability" and related terms, including "essential function" and "reasonable accommodation."

[370] 29 C.F.R. § 1630.2(m) (1997).

[371] *Id.* at pt. 1630 app. § 1630.2(m).

[372] *Id.*

[373] Kathryn W. Tate, "The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Require Reassignment?" *Texas Law Review*, vol. 67 , p. 797 (1989) (citations omitted).

Essential Function

The ADA's legislative history establishes the intended meaning of the term "essential function." The House Committee on Education and Labor notes that essential functions differ from marginal functions related to the job. For example, an employer may not require that an employee have a driver's license if the job does not normally require driving. In this case, driving would be a marginal function of the job and cannot be used to exclude a person with a disability.[377] The House Committee on the Judiciary report states that essential functions are those that *must* be performed. However, how an employee with a disability performs a given activity may differ from how an employee without a disability performs the same activity.[378] For example:

> in a job requiring the use of a computer, the essential function is the ability to access, input, and retrieve information from the computer. It is not "essential" that a person be able to use the keyboard or visually read the information from a computer screen. Adaptive equipment or software may enable a person with no arms or a person with impaired vision to control the computer and access information.[379]

The House Judiciary Committee report notes that a written job description may be used to identify the essential functions of the job and that the employer's determination of what is an essential function may be challenged.[380]

The EEOC regulations state that the employer's judgment on which functions are essential and written job descriptions prepared before advertising a position may be used to identify the essential functions of a job.[381] However, the employer's judgment is not the only factor to be used in determining the essential functions of a position. Other evidence includes: the amount of time spent on the job performing the function, the consequences of not requiring the incumbent to perform the function, the terms of a collective bargaining agreement, the work experience of past incumbents in the job, and the current work experience of incumbents in similar jobs.[382]

The regulations define essential functions as the "fundamental job duties of the employment position" and provide specific examples of the kinds of functions that should be considered essential.[383] For example, a function is essential if the purpose of the job is to perform that function, there is a limited number of employees available to do that function, or the function is highly specialized and the incumbent is hired for his or her expertise to perform that particular function.[384] In all, EEOC's regulations provide 10 factors for identifying essential functions: 7 types of evidence and 3 kinds of functions that suggest the "essential" nature of a given job function.[385]

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[374] *See* 29 C.F.R. §§ 1630.2(m),(n),(o),(p),(q),(r) (providing definitions of the terms "qualified individual with a disability," "essential functions," "reasonable accommodation," "undue hardship," "qualifications standards," and "direct threat") (1997); *see also id.* at pt 1630 app. §§ 1630.2, 1630.3.

[375] EEOC, "Policy Guidance: Provisions of the ADA," p. 11.

[376] Mastroianni interview, p. 2.

[377] H.R. Rep. No. 101–485(II), at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337.

[378] H.R. REP. NO. 101–485(III), at 33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 456.

[379] *Id.*

[380] *Id. at* 33–34, *reprinted in* 1990 U.S.C.C.A.N. 445, 456–57. Senator Harkin further elaborated on the process of determining which functions are essential: "a court must give consideration to the employer's judgment as to what functions are essential and must accept as evidence written job descriptions. A job description that is not tailored to the actual functions of the job, however, will ultimately have little weight. Based on the evidence submitted by the complainant and the respondent, the judge must ultimately decide what constitutes the essential functions of the job." 136 CONG. REC. S9,686 (daily ed. July 13, 1990) (statement of Sen. Harkin).

[381] 29 C.F.R. § 1630.2(n)(3)(ii) (1997).

[382] *Id. at* § 1630(n)(3)(iii)–(vii); H.R. Rep. No. 101–596, at 58 (1990).

[383] 29 C.F.R. § 1630.2(n) (1997).

[384] *Id.* at §§ 1630.2(n)(2)(i)–(iii).

The regulations clearly state that these are only examples of evidence that might go to showing that a particular job function is essential. EEOC's interpretive guidance on essential functions clarifies that the inquiry into whether a function is essential "is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards."[386] The guidance states that if an employer imposes certain requirements, it does not have to explain why it chose those requirements. However:

> it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.[387]

The EEOC ADA technical assistance manual emphasizes that it is not necessary for an employer to do a job analysis to determine the essential functions of a given job.[388] However, if an employer chooses to do a job analysis, it should focus on outcomes or results of specific job tasks rather than on the way they are customarily performed.[389] Such job analyses can be particularly useful in helping to identify accommodations that will enable an individual with specific abilities and limitations to perform the requirements of the job.[390]

One review of disability discrimination caselaw reveals significant disagreement among the courts on certain issues relating to the determination of "essential function,"[391] particularly with respect to how criteria for determining what is an essential function should be applied. The cases illustrate how "divergent results" can obtain even applying the same criterion.[392]

For example, looking at how the amount of time spent on a given function affects a decision on whether that function is essential, the cases do not yield consistent results.[393] In *Ackerman v. Western Electric*, the plaintiff contracted a bronchial infection that required her to stay away from dust.[394] The court determined that her job required heavy exposure to dust 32 percent of her work time in the 7 months before her discharge and 88 percent in the month before her discharge. However, based on the fact that over the entire 3-year period of her employment, she was only exposed to dust 11.5 percent of her time, the court found that this was proportionately too insignificant an amount of time spent to be considered an essential function of her position.[395] On the other hand, in *Mauro v. Borgess Medical Center*,[396] the court found that although the need for a surgical technician to place his hands in direct contact with or in the immediate vicinity of an incision arises infrequently, the need for such assistance is foreseeable and is essential to the success of the surgical procedure.

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[385] *See id.* at 29 C.F.R. § 1630(n)(2)-(3). *See also* H.R. Rep. No. 101-596, at 58 (1990).

[386] *Id.* at pt. 1630 app. § 1630.2(n).

[387] *Id.*

[388] EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, (EEOC-M-1A), January 1992, p. II-21 (hereafter cited as EEOC, *ADA Technical Assistance Manual*).

[389] Ibid., p. II-21.

[390] In illustrating these points, EEOC offers the example of a computer programmer's job, stating that to maintain the focus on outcomes rather than means, the essential function of this job might be framed as "ability to develop programs that accomplish necessary objectives," rather than "ability to manually write programs." EEOC, *ADA Technical Assistance Manual*, p. II-21. In another example, a job that requires heavy objects to be moved from one place to another, the focus in the job description should be on the moving, the result, rather than manually lifting, a possible method. Ibid., p. II-21.

[391] David Copus, "Americans with Disabilities Act: Conduct and Drug/Alcohol Issues, Benefits Issues, Mental Disabilities Cases," April 1997, in National Employment Law Institute, *1997 Americans with Disabilities Act Compliance Manual* (Washington, DC: National Employment Law Institute, 1997), pp. 25-31 (hereafter cited as Copus, "Americans with Disabilities Act").

[392] Ibid., p. 26.

[393] *Compare* Ackerman v. Western Electric Co., Inc., 643 F. Supp. 836 (N.D. Cal. 1986), *aff'd.*, 860 F.2d 1514 (9th Cir. 1988) *with* Mauro v. Borgess Medical Center, 886 F. Supp. 1349 (W.D. Mich. 1995), *aff'd.*, 137 F.3d 398 (6th Cir. 1998).

[394] 643 F. Supp. at 842.

[395] *Id.* at 846.

[396] 886 F. Supp. 1349 (W.D. Mich. 1995), *aff'd*, Estate of William C. Mauro v. Burgess Medical Center, 137 F.3d 398 (6th Cir. 1998), *petition for cert. denied*, 66 U.S.L.W. 3773 (U.S. May 21, 1998) (No. 97-1870).

It is, therefore, properly characterized as an essential function, not a marginal function of the position.[397]

These cases suggest that the essential function determination is not one that lends itself to establishing clear precedent through the development of standards based on specific criteria. As this reviewer observed:

> the EEOC's multifactored technique may turn the identification of a job's "fundamental" duties into a thespian nightmare, as each participant in the debate stresses the importance of his or her chosen subset of the ten factors [EEOC's three factors for identifying essential functions and seven types of evidence], or seeks to add still others. Unfortunately, the EEOC's rules provide no guidance for the arbiter of the debate to declare a winner.[398]

Courts also have reached radically differing conclusions on the latitude employers should be given in identifying what is an essential function. For example, in *Borkowski v. Valley Central School District*,[399] the court required the employer school district to show specific evidence to support its contention that maintaining control over a classroom is an essential function of a teacher's job that could not be accommodated in the manner proposed by the plaintiff.[400] In another case, *Kuehl v. Wal-Mart Stores, Inc.*,[401] a court found that standing was an essential part of a store's "door greeter" job and providing a stool to an employee whose disability prevented her from standing for a long period of time was not required by the ADA because it would eliminate an essential function.[402] In the former case, a teacher's ability to maintain control of his or her classroom, arguably a fundamental function, required evidence that it was an essential function.[403] In the latter case, an employer's requirement that a store greeter remain constantly standing, a seemingly arbitrary and marginal function, met another court's standard in designating essential functions.[404]

Reasonable Accommodation

The ADA's legislative history provides some examples of reasonable accommodations made by employers for employees with disabilities. The Senate Committee on Labor and Human Resources report reprints comments by the chairperson of the President's Committee on Employment of People with Disabilities in which he gave the following examples: a timer costing $26.95 with an indicator light allowing a medical technician who was deaf to perform laboratory tests required for her job; a light probe costing $45 allowing a visually impaired receptionist to determine which lines on her telephone were ringing, on hold, or in use; and a headset costing $49.95 allowing an insurance salesperson with cerebral palsy to write while talking.[405]

EEOC's title I regulations describe reasonable accommodation as:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.[406]

EEOC's interpretive guidance in the appendix to its title I regulations lists three categories of reasonable accommodation: (1) accommodations that are required to ensure equal opportunity in the application process, (2) accommodations that enable employees with disabilities to perform the essential functions of the position held or desired, and (3) accommodations that enable employees with disabilities to enjoy benefits and privileges of employment equal to those of employees without disabilities.[407]

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[397] *Id.* at 1354.

[398] Copus, "Americans with Disabilities Act," p. 26.

[399] 63 F.3d 131 (2d Cir. 1995).

[400] *Id.* at 141–42.

[401] 909 F. Supp. 794 (D. Colo. 1995).

[402] *Id.* at 801–02.

[403] Borkowski, 63 F.3d at 140.

[404] Kuehl, 909 F. Supp. at 801–02.

[405] S. Rep. No. 101-116, at 10 (1989).

[406] 29 C.F.R. § 1630.2(o)(1) (1997).

EEOC's title I regulations reiterate the statutory language in providing the following examples of reasonable accommodations: 1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and 2) job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.[408]

EEOC's Associate Legal Counsel explained in more detail how the Commission interprets reasonable accommodation. She stated that for EEOC, the term "reasonable" has a specific meaning: "reasonable" means "effective." Thus, for EEOC, an accommodation is reasonable *if it will work*.[409] The plaintiff/employee has to show that the accommodation would enable him or her to work. Then it is up to the employer to prove undue hardship. She indicated that EEOC has not stated this position yet in enforcement guidance, but said that it may have done so in informal advisory letters and certainly she has enunciated the position in her speeches.[410]

A review of the caselaw shows that several significant issues relating to reasonable accommodation have emerged in the courts. The first has to do with defining the limits of the reasonable accommodation provided in a given case. A recent case in the Sixth Circuit shows some of the ambiguity involved in determining what constitutes a reasonable accommodation.

The claimant in *Cassidy v. Detroit Edison Company*[411] was diagnosed as having chemical bronchitis after being exposed to smokestack emissions at work. This disorder caused her to have allergic reactions from workplace exposure to cleaning chemicals, diesel fumes, food odors, paint fumes, and smoke.[412] The employer, Detroit Edison, responded by transferring the claimant to a new position, shifting her work hours, allowing her to leave work when known allergens would be present in the air, testing the workplace air quality for compliance with environmental standards, and allowing her to wear a mask and use a breathing machine at work. When the claimant's condition worsened, her doctors recommended that she required a position with an "allergen-free" workplace. Detroit Edison responded that it had no jobs "compatible" with the claimant's needs. The claimant sued under the ADA.[413]

The Sixth Circuit agreed with the lower court's decision that although the claimant was disabled because she was substantially limited in her ability to breathe, Detroit Edison had done all that it could to accommodate her. Moreover, the court determined that the claimant failed to identify "precise limitations" created by her disability. The court found that the claimant's request for an allergen-free workplace, which her employee attempted to locate, was simply too vague to "reasonably" accommodate, in the court's opinion.[414] This case appears to indicate certain broad-based standards for defining the limits of what is "reasonable" in accommodating an employee with a disability.

Another issue of significance relating to reasonable accommodation that has emerged in caselaw involves reassignment of employees as a reasonable accommodation. For example, in a recent case the Tenth Circuit held that employers are not obligated under the ADA to provide another job as a reasonable accommodation. In *Smith v. Midland Brake, Inc.*,[415] the majority of a Tenth Circuit three-judge panel stated that "under the ADA, when a plaintiff is not qualified, even with reasonable accommodation, for the job which he currently holds [or from which he was terminated]. . .the employing entity has no obligation to consider reassigning him to another position."[416] At the request of EEOC and the plaintiff's attorney, however, the Tenth Circuit has agreed to rehear the issue of reasonable accommodation with all 12 judges present.[417]

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[407] *Id.* at pt. 1630 app. § 1630.2(o).

[408] *Id.* at § 1630.2(o)(2).

[409] Mastroianni interview, p. 4 (emphasis added).

[410] Ibid., *See* discussion below on the Seventh Circuit case, Vande Zande v. State of Wisconsin, 44 F.3d 538 (7th Cir. 1995).

[411] 1998 U.S. App. LEXIS 4407 (6th Cir. 1998).

[412] *Id.* at *3.

[413] *Id.* at *6–*9.

[414] *Id.* at *15–*16.

[415] 1998 U.S. App. LEXIS 4495 (10th Cir. 1998), *reh'g granted*, No. 96–3018 (May 5, 1998) (unpublished order).

EEOC has addressed the reassignment issue presented in the *Midland Brake* case in its enforcement guidance. For example, it has stated in its enforcement guidance on workers compensation that where an employer reserves light duty positions for employees with occupational injuries:

> If an employee with a disability who is not occupationally injured becomes unable to perform the essential functions of his/her job, and there is no other effective accommodation available, the employer must reassign him/her to a vacant reserved light duty position as a reasonable accommodation if (1) s/he can perform its functions with or without a reasonable accommodation; and (2) the reassignment would not impose an undue hardship. This is because reassignment to vacant position and appropriate modification of an employer's policy are forms of reasonable accommodation required by the ADA, absent undue hardship.[418]

The language used in this statement seems simple and direct enough. The rationale given in the statement above is that reassignment is a form of reasonable accommodation required by the ADA. Based on this, it would appear that reassignment is only required for *qualified* individuals with disabilities, since this is the only protected class under the ADA. The court in *Midland Brake* found some ambiguity here: first because the term "qualified individual" refers to meeting qualifications standards for the position held or desired and in the context of reassignment the question arises of whether the individual with a disability has to be qualified for the job he or she currently holds or for the one to which he or she seeks reassignment; and second, does the qualified individual standard demand that individuals with disabilities be able to perform the essential functions of the reassigned job with or without reasonable accommodation?

EEOC's Associate Legal Counsel stated in an interview that an individual with a disability is entitled to reassignment under two circumstances: (1) if it would create an undue hardship for the employer to keep the person in the original job with a reasonable accommodation, and (2) if the person can no longer perform the essential functions of the original job. She gave the following example. Suppose an essential function of the original job was to drive, and the individual with a disability can no longer drive. Then, it is EEOC's position that the employer must look for vacant positions where the individual with a disability can perform the job. According to her, the courts that found to the contrary misread EEOC's guidance and the technical assistance manual. "This issue has been covered over and over."[419] The Associate Legal Counsel also said that issuing an enforcement guidance on such a small issue as this one would not be an effective way of clarifying or further explaining EEOC's position.[420] She noted that EEOC is addressing the controversy in an *amicus* brief in the *Midland Brake* case.[421]

Some courts have questioned whether employers have any duty to reassign an employee.[422] The Seventh Circuit, for example, recently held that the duty to reassign only requires the employer to *consider* a reassignment, or to go through an interactive process in which all potential options are discussed between employer and employee. The Seventh Circuit has applied a public policy argument in deciding that employees with disabilities do not have a right to reassignment to *any* job in the corporation.[423] In

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[416] *See id.* at *22. *See also* Barbara Yuill, "Duty to Accommodate Disabled Worker Does Not Include Reassignment Into New Job," *BNA's Daily Labor Report* (Mar. 18, 1998), pp. A-1—A2.

[417] *See* Smith v. Midland Brake, Inc., No. 96–3018 (10th Cir. May 5, 1998) (order granting rehearing *en banc)*; Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of the Plaintiff-Appellant on Rehearing En Banc, at 4, Smith v. Midland Brake, Inc., No. 96–3018 (10th Cir. 1998).

[418] EEOC, "EEOC Enforcement Guidance: Workers' Compensation and the Americans with Disabilities Act," p. 22 (EEOC Notice 915.002), Sept. 3, 1996.

[419] Mastroianni interview, p. 4.

[420] Ibid.

[421] Ibid. *See* Brief of the Equal Employment Opportunity Commission as *Amicus Curiae*, Smith v. Midland Brake Co., 138 F.3d 1304 (10th Cir. 1998) (No. 96–3018).

[422] *See, e.g.* DePaoli v. Abbott Laboratories, 1998 U.S. App. LEXIS 5992 (7th Cir. 1998).

[423] Rather, the right to reassignment includes a "restricted class of positions" commensurate with the range of jobs the employee is capable of handling. *Id.* at *20–*21.

Dalton v. Subaru-Isuzu Automobile, Inc.,[424] the court concluded that requiring employers to accommodate employees by transferring or reassigning them "would convert a nondiscriminatory statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees."[425]

This argument has found support in the business community. For example, the general counsel of the Equal Employment Advisory Council, an employer advocacy organization in Washington, D.C., recently has been quoted as stating that "it's the difference between looking and finding."[426] She stated that, as part of their duty to reasonably accommodate, employers might be required to *look* for an alternative position.[427] However, she added that employers should not be *required to find* a reassignment or be held liable if they fail to find a job or reassign a disabled person into a job.[428]

As EEOC's Associate Legal Counsel has noted, the agency has addressed this issue in several other contexts. One is with reference to individuals who have an infectious or communicable disease and work in a job that involves food handling. EEOC's title I regulations state that "[i]f an individual with a disability is disabled by one of the infectious or communicable diseases included on [the Department of Health and Human Services] list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the *employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling*."[429]

According to this language, an employer is required to consider reassignment for an employee who cannot perform his/her current job even with reasonable accommodation. This situation is similar to the one in *Midland Brake*, in that it is *impossible* for the employee to perform his/her current job, regardless of reasonable accommodation. This is an example of EEOC's clearly stating that the duty to consider reassignment does not evaporate if an employee cannot perform his/her current job regardless of reasonable accommodation.

EEOC filed an *amicus curiae* brief in *Midland Brake*[430] in which the agency observed:

> the [Tenth Circuit] panel has misconstrued . . . the Commission's view that "there is no obligation to reassign" under the ADA where "no amount of accommodation" would make the individual qualified for his current job.[citation omitted] To the contrary, the Commission has taken the position . . . that, absent undue hardship, an employer has an obligation to reassign a disabled employee to a vacant position for which the employee is qualified anytime accommodation is not possible in the employee's current position.[431]

In a 1997 informal advisory letter[432] EEOC stated that an employer is not required to reassign an individual with a disability where there is no vacancy to which the employee may be assigned.[433] On the other hand, if there is a vacancy that the individual can perform (with or without reasonable accommodation), or if one will become available within a reasonable amount of time, and the employer has already determined that there is no way to accommodate the individual in his or her present position, the employer must reassign the individual.[434] The EEOC noted in this letter that an employee without a disability who had been bumped to facilitate a reasonable accommodation may have a legitimate claim under applicable State law, an applicable bargaining agreement, title VII, or the Equal Pay Act.[435]

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[424] 1998 U.S. App. LEXIS 5990 (7th Cir. 1998).

[425] *Id.* at *35.

[426] Bureau of National Affairs, Inc., *Fair Employment Practices: Summary of Latest Developments*, April 6, 1998, p. 39 (Washington, DC: Bureau of National Affairs, Inc.) (hereafter cited as BNA, *Fair Employment Practices*).

[427] Ibid., p. 39 (emphasis added).

[428] Ibid.

[429] 29 C.F.R. § 1630.16(e) (1997) (emphasis added).

[430] Brief of Equal Employment Opportunity Commission as *Amicus Curiae* at 2, Smith v. Midland Brake, Inc., 1998 U.S. App. LEXIS 4495 (10th Cir. 1998) (No. 96–3018).

[431] *Id.*

[432] Claire Gonzales, Director of Communications and Legislative Affairs, Office of Communications and Legislative Affairs, EEOC, letter to Lee H. Hamilton, U.S. House of Representatives, re: Reassignment (Jul. 17, 1997), *reprinted in* 11 NAT. DISABILITY L. REP. (LRP) ¶ 388.

[433] *See* ibid.

[434] *See* ibid.

A final issue of interest relating to reasonable accommodation has been whether or not plaintiffs claiming disability under the third or "regarded as" prong are entitled to reasonable accommodation. Intuitively, it seems unnecessary to provide any accommodation to an individual who does not actually *have* a disability but is only *regarded as* or perceived as having one. However, this was an issue in a recent case decided by the Third Circuit.

In *Deane v. Pocono Medical Center*,[436] the Third Circuit, sitting *en banc*, ruled that a nurse whose wrist injury impeded her ability to do heavy lifting could go forward with her ADA claim against her employer, which based its termination on its perception that she had a disability. The court asked: to be considered "qualified" under the ADA, must "regarded as" plaintiffs show that they can perform all of the functions of a job, or just the essential ones, to be "qualified individuals with disabilities"? The court found that the ADA requires the same showing for these plaintiffs as for all others, namely, that they can perform the essential functions of the job held or sought.[437] However, in finding that "regarded as" plaintiffs have to meet the same standard as claimants who seek to prove the presence of an actual disability, another issue arises: if qualified individuals are those who can perform the essential functions of the job *with or without reasonable accommodation*, is a plaintiff who proves that he or she was perceived as having a disability, and can perform the essential functions of the job, entitled to reasonable accommodation? The court did not reach this issue. It determined that its resolution was unnecessary to the final disposition of the appeal.[438]

Nonetheless, this is an unsettled issue on which EEOC has not published any guidance. The *Deane* court observed that "Congress intended that the scope of the Act would extend not only to those who are actually disabled, but also to individuals regarded as being disabled."[439] Moreover, the court noted that "nowhere in the Act does it distinguish between actual or perceived disabilities in terms of the threshold showing of qualifications."[440]

Arguments on both sides of this issue seem to have merit. Although the court did not resolve this issue, it did set forth the arguments on both sides. Deane's argument, according to the court, was that:

> as a matter of statutory interpretation, "regarded as" plaintiffs are entitled to the same reasonable accommodations from their employers as are actually disabled plaintiffs. [Deane] reasons that, just as we found that a plain reading of the ADA only requires plaintiffs to show that they can perform the essential functions of the job, a plain reading of the definition of "qualified individual" demonstrates that a "regarded as" plaintiff is qualified so long as she can perform the essential functions with reasonable accommodation.[441]

The defendant's argument was that:

> a "regarded as" plaintiff 's only disability is the employer's irrational response to her illusory condition. Under these circumstances . . . it simply makes no sense to talk of accommodations for any physical impairments because, by definition, the impairments are not the statutory cause of the plaintiff 's disability. Adopting Deane's interpretation of the ADA would . . . : (1) permit healthy employees to, through litigation (or the threat of litigation) demand changes in their work environments under the guise of "reasonable accommodations" for disabilities based upon misperceptions; and (2) create a windfall for legitimate "regarded as" disabled employees who, after disabusing their employers of their misperceptions, would nonetheless be entitled to accommodations that their similarly situated co-workers are not, for admittedly non-disabling conditions.[442]

Finally, the lone dissenter in the case, Judge Greenberg, agreed with the defendant's position. He stated that "Congress did not pass the ADA to permit persons without a disability to demand accommodations,"[443] and "[i]nasmuch as Deane is not actually disabled, she has no right to an accommodation whether or not the accommodation would impact on her ability to perform the essential functions of the job."[444] This question which the majority in *Deane* did not reach and the dissent answered in the negative is one that has not been explicitly addressed in the ADA, in its legislative history, or by EEOC.

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[435] *See* ibid.

[436] 1998 U.S. App. LEXIS 7622 (3rd Cir. 1998).

[437] *Id.* at *23.

[438] *Id.* at *4.

[439] *Id.* at *2.

[440] *Id.* at *23.

[441] *Id.* at *29 n.12.

[442] *Id.* at *29, n.12.

Business Justification

The legislative history of the ADA clarifies that the term reasonable accommodation refers only to an accommodation that would not impose an undue hardship on the employer.[445] EEOC's title I regulations state that an employer may defend itself against a charge of disparate treatment by demonstrating that the challenged action has a legitimate, nondiscriminatory justification.[446]

The legislative history also says that disparate treatment cannot be justified by the argument that an employee is not covered by the employer's current insurance plan or that reasonable accommodation would cause the employer's insurance premiums or workers compensation costs to increase.[447] Finally, the EEOC interpretive guidance makes clear that the employer's defense of a legitimate nondiscriminatory reason is rebutted if the claimant can show that the employer's alleged nondiscriminatory reason is pretextual for discrimination on the basis of disability.[448]

The EEOC regulations provide a second defense for two specifically defined employer actions. These actions are: 1) application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability; and 2) uniform application of standards, criteria, or policies that have a "disparate impact" on an individual with a disability or a class of individuals with disabilities.[449] The defense for employers who have engaged in either of these two actions is that their actions were "job-related and consistent with business necessity, and such performance [could not] be accomplished with reasonable accommodation, as required in this part."[450]

EEOC's interpretive guidance explains that, with respect to title I of the ADA and its regulations, disparate impact means that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities.[451] In addition, even if the criterion is shown to be job related and consistent with business necessity, an employer could not exclude an individual with a disability if the individual could meet the criterion or accomplish the job function with a reasonable accommodation.[452] For example, suppose an employer requires, as part of its application process, an interview that is job related and consistent with business necessity.[453] The employer would not be able to refuse to consider deaf or hard of hearing applicants on the basis that they could not be interviewed because an interpreter could be provided as a reasonable accommodation that would allow the individuals to be interviewed, and thus satisfy the selection criterion.[454]

Disparate impact theory can be applied to nonselection criteria as well as selection criteria, with the same requirement for considering reasonable accommodation. Uniformly applied nonselection criteria include specific policies and practices relating to job performance. According to EEOC's interpretive guidance, some policies, such as leave policies, are not subject to challenge under disparate impact theory.[455] However, even in the case of a leave-related policy, such as a "no-leave" policy for the first 6 months of employment, an employer may still be required, under appropriate circumstances, to afford reasonable accommodation in the form of an exception to such a policy.

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[443] *Id.* at *33 (Greenberg, J., dissenting).

[444] *Id.* at *34 – *35 (Greenberg, J., dissenting).

[445] H.R. Rep. No. 101–485(II), at 76 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 358.

[446] 29 C.F.R. § 1630.15(a) (1997). *See also* 42 U.S.C. § 12112(b) (1994). In its interpretive guidance EEOC provides examples of practices that are discriminatory. For example, it would be discriminatory to exclude an employee with a severe facial disfigurement from attending staff meetings simply because that employee makes the employer uncomfortable. Similarly, it would be discriminatory to implement a policy of not hiring people with AIDS regardless of their qualifications. 29 C.F.R. pt. 1630, app. § 1630.15(a) (1997).

[447] 29 C.F.R. pt. 1630, app. § 1630.15(a) (1997) (citing S. Rep. No. 101–116, at 85 (1989); H.R. Rep. No. 101–485(II), at 136 (1990); and H.R. Rep. No. 101–485(III), at 70 (1990)).

[448] *Id.*

[449] *Id.* at §§ 1630.15(b)(1),(c).

[450] *Id.*

[451] *Id.* at pt. 1630, app. §§ 1630.15(b) and (c).

[452] *Id.*

[453] *Id.*

[454] *Id.*

[455] *Id.*

Direct Threat

If an employer can prove that an employee or potential employee presents a direct threat, then that employee is no longer considered "qualified." "Direct threat" is defined in the ADA as 'a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[456] EEOC's regulations define "direct threat" as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[457] The regulations further state:

> The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.[458]

The regulations state that the factors to be considered in determining whether an individual would pose a direct threat include: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.[459]

EEOC recently brought suit in Texas against an employer whose drug and alcohol policy barred all employees with current or former substance abuse problems from working in safety-sensitive jobs. In *EEOC v. Exxon Corporation*,[460] EEOC argued that the policy violated the ADA by screening out people based on their disability, instead of individually assessing each person's capacity to perform a job. The employer argued that its policy was a "business necessity" because without the policy it could be exposed to environmental or tort liability, or criminal charges.[461]

In response to the employer's business necessity argument, EEOC argued that when a policy is based on safety, the defense that it is a business necessity can only be satisfied by showing that the excluded individuals posed a direct threat to the health or safety of others in the workplace.[462] The court framed the central issue in the case "whether Exxon is relegated to defending its safety-based policy as 'consistent with business necessity' under the rigorous direct threat standard or whether the Act permits the more broad-based business necessity defense urged by Exxon."[463] The court found in favor of EEOC and cited EEOC's interpretive guidance in the appendix to its title I regulations.[464] The court also found that EEOC's construction of the statute was reasonable "in light of the Act's text, history and purpose,"[465] and court concluded that:

> the statutory scheme of the ADA, its legislative history and stated purpose support a finding that safety-based qualification standards which screen out the disabled can only be justified by meeting the direct threat test. Consequently, Exxon's reliance on potential civil and criminal liability, concerns about the environment and its corporate citizenship will not suffice to justify its policy as a business necessity.[466]

A direct threat issue figures prominently in the *Bragdon v. Abbott* case. One of the issues in the *Bragdon* case was the level of deference service care providers must accord the medical judgments of public health and professional organizations, such as the Centers for Disease Control and the American Dental Association, in determining the presence of a direct threat.[467] In *Bragdon*, the First Circuit relied on Dentistry Guidelines from the Centers for Disease Control that recommended certain precautions for dental professionals to take to reduce the risk of transmitting disease.[468] The court also relied on the American Dental Association's policy statement that there is little risk of transmitting infectious disease through dental treatment.[469]

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[456] 42 U.S.C. § 12111(3) (1994).

[457] 29 C.F.R. § 1630.2(r) (1997).

[458] *Id.*

[459] *Id.*

[460] 1998 U.S. Dist. LEXIS 5486 (N.D. Tex. 1998).

[461] *Id. at* * 8– 9.

[462] *Id.* at *9–*10.

[463] *Id.* at *11.

[464] *Id.* at *16, n.7 (citing 29 C.F.R. pt. 1630.15 (b)&(c)) (with regard to safety requirements that screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual satisfies the "direct threat" standard in § 1630.2(r) to show that the requirement is job related and consistent with business necessity).

[465] *Id.* at *17–*18 (citing Southern California Edison Co. v. Federal Energy Regulatory Comn., 325 U.S. App. D.C. 163, 116 F.3d 507, 511 (D.C. Cir. 1997)).

[466] *Id.* at *29.

The Supreme Court concluded that the data presented from the Centers for Disease Control and the American Dental Association were not "definitive" and did not properly assess the level of risk that treating the HIV patient presented.[470] The Court interpreted the statements as recommendations on how professionals should conduct themselves and not as authority on statistical likelihood.[471]

The Court declined to decide the issue of direct threat because it did not have the briefs and records containing information necessary to make a determination.[472] It ordered the lower court to further explore and review the evidence of significant risk, while acknowledging that it may reach the same decision as before.[473]

Undue Hardship

Under the ADA, if a proposed accommodation would cause "undue hardship," an employer does not have to make such an accommodation. Title I defines undue hardship as:

> an action requiring significant difficulty or expense, when considered in light of . . . (i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[474]

EEOC's title I regulations reiterate this language. The regulations define undue hardship as meaning, with respect to providing an accommodation, "significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section."[475] These factors are the same as those mentioned in the statute (above).[476] Therefore, an employer who can show evidence of one or more of these factors can avoid having to provide reasonable accommodation to a qualified individual with a disability.[477]

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[467] *See* 66 U.S.L.W. 4601, 4608–10 (U.S. June 25, 1998). *See also* "The Three Main Disability Questions in *Bragdon v. Abbott*," *Disability Compliance Bulletin*, vol. 11, iss. 7 (Mar. 26, 1998), p. 6. This piece discusses the three main issues in the case: Does the ADA protect all people with HIV from discrimination, even if they exhibit no symptoms of illness? Is a plaintiff protected under the statute if her HIV infection impedes her ability to bear and raise children? Put another way, is reproduction a major life activity? Should courts defer to the professional judgment of a dentist or doctor in evaluating whether a patient poses a direct threat to his health or safety? Ibid.

[468] *See* Bragdon, 66 U.S.L.W. at 4608–09.

[469] *See id.*

[470] *Id.* at 4609.

[471] *Id.*

[472] *Id.*

[473] *Id.*

[474] 42 U.S.C. § 12111(10) (1994).

[475] 29 C.F.R. § 1630.2(p)(1) (1997).

[476] *See id.* at § 1630.2(p)(2).

[477] In 1998 proponents of a religious antidiscrimination bill in Congress, the "Workplace Religious Freedom Act," relied heavily on an analogy with the legal requirements for disability cases already applied in Federal civil rights actions under the Americans with Disabilities Act. In particular, the bill analogizes the requirement for reasonable accommodation and the exception of "undue hardship." S. 1124, 105th Cong. § 2 (1998). This analogy has been used for many years by plaintiffs claiming discrimination on the basis of religion under title VII of the Civil Rights Act of 1964. *See* Trans World Airlines v. Hardison, 432 U.S. 63 (1977).

In testifying before a Senate hearing on this new legislation, one witness stated "the current definition of 'religion' in title VII places it in a special category of regulation that goes beyond expression and state of being. The current definition impliedly requires an employer to reasonably accommodate any religious observance or practice unless the employer can demonstrate that a suggested accommodation would impose an 'undue hardship' on the employer. [citation omitted] Thus, as with certain disabilities, certain religious observances and practices sometimes conflict with ordinary requirements of the workplace. This was the fundamental reason that conduct related to disabilities in the workplace could not be regulated by merely adding 'disabled' to the

EEOC's interpretive guidance offers more clarification: "undue hardship provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. Undue hardship refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[478]

A senior attorney in EEOC's ADA Policy Division has explained that the first consideration in the reasonable accommodation analysis always should be whether the proposed accommodation is effective.[479] All consideration of the cost and practicality of the proposed accommodation belongs in the second stage of the analysis, where it is considered whether the proposed accommodation poses an undue hardship. Therefore, the cost or practicality of a proposed accommodation does not enter into whether it is considered "reasonable."

The interactive process to determine whether reasonable accommodation is possible should start with the employer asking the individual with a disability what accommodations might solve the problem.[480] The undue hardship analysis should come into play *only once they have narrowed down the possibilities.* At that point, the employer should examine whether the reasonable accommodations would pose an undue hardship.

This attorney added that if a proposed accommodation would be effective, then a defense for the employer can be that it would be unduly costly or would impose a significant burden on the employer.[481] Under the ADA, the test is whether the proposed accommodation would impose a significant cost or create a significant disruption to the operations of the employer. Being burdensome, by itself, is too general. The employer would have to establish the significance of the burden. The "significance" of a burden is determined in terms of the resources of the employer such as keeping other workers from performing their jobs or completely changing the operations of the employer.[482] For instance, in evaluating whether there is an undue hardship on the employer, EEOC might consider whether the employer has multiple facilities and how resources are allocated across those facilities. Whether the disruption is undue hardship depends on the type of operation, the type of reasonable accommodation, and the type of position, and it must be determined on a case-by-case basis.

One commentator who opposes EEOC's position on the undue hardship analysis asserts: "Clear and precise definitions of 'reasonable accommodation' and 'undue hardship'—such as dollar caps—are a necessary first step in ADA reform. . . ."[483] This commentator quotes a New Haven, Connecticut, lawyer as saying: "The regulations don't say anything about cost-benefit analyses. You might have to spend $100,000 to accommodate someone on a job that is only worth $25,000 to you. Tough. You've been conscripted to provide opportunities."[484]

Not all courts agree with EEOC's interpretation of the proper analysis for determining undue hardship. A review of caselaw addressing the undue hardship analysis reveals that the Federal courts are also seeking to better identify its meaning and its limits. One notable example is *Lori L. Vande Zande v. State of Wisconsin.*[485] In *Vande Zande,* the plaintiff was a paraplegic whose paralysis caused her to develop pressure ulcers periodically, requiring her to stay at home for several weeks.[486] The court rejected the employer's argument that it had no duty to accommodate the plaintiff's ulcers because they were

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string of personal characteristics protected by title VII. Instead, a whole new statutory scheme was created—the Americans with Disabilities Act." *Hearing on S. 1124, the "Workplace Religious Freedom Act," Before the Senate Comm. on Human and Labor Resources,* 105th Cong. (statement of Lawrence Z. Lorber, Esq., Verner Liipfert, Washington, DC).

[478] 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997).

[479] *See* Sharon Rennert, Senior Attorney, ADA Policy Division, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 7, 1998, p. 1 (hereafter cited as Rennert interview). *See also* p. 73, this chapter.

[480] *See* Rennert interview, pp. 1–3.

[481] Ibid., p. 2.

[482] Ibid.

[483] Brian Doherty, "Unreasonable Accommodation: The Case Against the Americans with Disabilities Act," *Reason* (August/September 1995), pp. 19–26, 26.

[484] Ibid., p. 26.

[485] 44 F.3d 538 (7th Cir. 1995).

[486] *Id.* at 543.

an intermittent, episodic impairment similar to a broken leg.[487]

The State of Wisconsin attempted to accommodate the plaintiff in numerous ways. These included modifying bathrooms, buying special adjustable furniture for the plaintiff, and adjusting the plaintiff's schedule to accommodate medical appointments.[488] Nonetheless, the plaintiff believed that the State of Wisconsin had discriminated against her because it refused to allow her to work at home. In finding for the defendant, the Seventh Circuit observed:

> Even if an employer is so large or wealthy—or, like the principal defendant in this case, is a state, which can raise taxes in order to finance any accommodations that it must make to disabled employees—that it may not be able to plead "undue *hardship*," it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee. If the nation's employers have potentially unlimited financial obligations to 43 million disabled persons, the Americans with Disabilities Act will have imposed an indirect tax potentially greater than the national debt. We do not find an intention to bring about such a radical result in either the language of the Act or its history.[489]

In *Vande Zande*, the Seventh Circuit also suggested that there was no clear standard for defining the term "undue hardship." This is because it is a "term of relation"; therefore, "[w]e must ask, 'undue' in relation to what?"[490] According to the court, the answer, based on the statute's legislative history and the ADA itself, is probably in relation to "the benefits of the accommodation to the disabled worker as well as to the employer's resources."[491] Therefore:

> The employee must show that the accommodation is reasonable in the sense both of efficacious [sic] and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health.[492]

Thus, in effect, the Seventh Circuit disagrees with EEOC's position that for an accommodation to be reasonable it need merely be "effective."[493] The *Vande Zande* decision suggests that an employer may apply a cost-benefit analysis to determine whether a particular accommodation is reasonable.

If the Seventh Circuit's decision in *Vande Zande* is adopted by other courts, the concept of undue hardship may change considerably. There is precedent in which an employer was able to show that providing reasonable accommodation would financially ruin him. Citing to this case, *Barth v. Gelb*, the *Vande Zande* court observed that "[o]ne interpretation of 'undue hardship' is that it permits an employer to escape liability if he can carry the burden of proving that a disability accommodation reasonable for a normal employer would break him."[494]

The Seventh Circuit's discussion of undue hardship echoes the primary issue in the debate among policymakers, advocacy groups, and in the national news media over the ADA and EEOC's implementation of its employment provisions, particularly the requirement of reasonable accommodation. The main questions in this debate are: How far must an employer go? Is there any limit to reasonable accommodation based on a cost-benefit analysis? The Seventh Circuit in *Vande Zande* suggests that employers should be allowed to conduct a cost-benefit analysis during the reasonable accommodation negotiations rather than wait until an accommodation is settled on to determine whether it would be an undue hardship.

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[487] *See id.* at 544.

[488] *Id.* at 544.

[489] *Id.* at 542–43.

[490] *Id.* at 543.

[491] *Id.*

[492] *Id.*

[493] *See* discussion, p. 108, this chapter.

[494] 44 F.3d at 543 (citing Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994)).

5 Assessment of Enforcement Guidance on Title I Topics and Issues

EEOC has issued enforcement and policy guidance on ADA topics and issues. These documents have addressed legal and policy issues that include clarifying and explaining the meaning of important statutory terms such as "disability" and "qualified individual with a disability," stating and describing EEOC's position on the employment aspects of the ADA as they relate to specific disabilities and categories of disabilities such as psychiatric disabilities, and analyzing and taking specific positions on employment-related policy issues such as disability-based distinctions in employer health coverage plans, preemployment inquiries and medical examinations, workers' compensation, collective bargaining agreements, and the application of the ADA to American employees working overseas. EEOC also has issued briefer documents on ADA-related topics and issues such as a policy statement on disability and service retirement plans and a fact sheet providing technical assistance on the interplay between the ADA and the Family and Medical Leave Act.

A review of some of the major documents EEOC has published relating to title I reveals significant progress in the agency's efforts to address ADA issues and disseminate information about the statute's requirements. Part of the agency's effectiveness with its enforcement guidance derives from its choice only to publish policy or enforcement guidance on the most pressing or controversial ADA issues. These are issues that affect a great many people, including employers and businesses, individuals with disabilities who seek to work, and the agency's own investigators, who rely on the guidance in doing their work.[1] A discussion of each guidance offers a means of evaluating EEOC's efforts to guide and shape ADA implementation, enforcement, and judicial interpretation of the law.

ADA and Psychiatric Disabilities

In March 1997, EEOC published an enforcement guidance on the ADA and psychiatric disabilities.[2] EEOC designed this document to facilitate full enforcement of ADA on charges alleging employment discrimination based on a psychiatric disability. This document, like much of EEOC's ADA policy and enforcement guidance, is presented in question and answer format and provides numerous examples to make the complex issues associated with this topic as clear as possible.[3]

A 1994 congressional study had suggested that EEOC should provide more guidance to employers on employment discrimination based on psychiatric disabilities.[4] The report, developed by the U.S. Office of Technology Assessment, stated that many of EEOC's field offices lacked any information on psychiatric disabilities. According to the report, 28 of 40 EEOC field offices reported that they would like information on the nature of mental illness, its effects on employment functioning, and useful accommodations for people with mental disabilities. In addition, the report found that the current level of assistance provided to aid employers and people with psychiatric disabilities was not enough to aid in implementation of the act. The study blamed this problem not just on EEOC but on the complexity of psychiatric conditions, society's stigmatization of them, and the limited Federal funding available to address this issue.[5]

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[1] EEOC's enforcement guidance "Definition of the Term 'Disability'" is reviewed in chap. 4 because it directly addresses a major provision of the statute.

[2] U.S. Equal Employment Opportunity Commission (EEOC), "EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities," (EEOC Notice 915.002), Mar. 25, 1997 (hereafter cited as EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities").

[3] Ibid., pp. 1–2. Psychiatric disability falls under "mental impairment," which is covered under the ADA. 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g) (1997). *See also* EEOC, Compliance Manual § 902, Definition of the Term "Disability."

[4] *See generally* Office of Technology Assessment, *Psychiatric Disabilities, Employment, and the Americans with Disabilities*

EEOC's guidance on ADA and psychiatric disabilities unleashed a firestorm of controversy. Within days of its release, employment lawyers, clinicians in the psychiatric field, and the national media were engaging in a fierce debate over the guidance.[6]

The guidance remains the agency's official policy on the application of title I of the ADA for people with psychiatric disabilities in the workplace. EEOC Commissioner Paul Steven Miller has explained EEOC's main purposes in issuing guidance on the ADA and psychiatric disabilities:

> The underlying vision of the ADA is that it seeks to combat the fears, myths, and biases that people often associate with disabilities and to ensure that employment decisions are based upon a person's qualifications and not stereotypes. ADA is really that straightforward. The fears and the myths and the stereotypes about people with disabilities are most dramatic with respect to people with mental disabilities. It is ironic, however, that the highest incidence of disability is psychiatric, and yet psychiatric disabilities provoke the greatest prejudice. The media is partly to blame for perpetuating these stereotypes. Everybody has heard about or read about employees being described as crazed lunatics who have turned violent in the workplace oftentimes with disastrous results. People with disabilities, particularly mental disabilities have a terrible history of oppression. People with mental disabilities have been unable to get mortgages, own property, care for their children, or decide for themselves which treatment they want.[7]

The guidance seeks to raise awareness and understanding of the ADA as a law and how it protects people with psychiatric disabilities. The guidance defines the term "psychiatric disability" for purposes of the ADA and discusses employee conduct issues, as well as key concepts such as "reasonable accommodation" and "direct threat" as they relate to people with psychiatric disabilities in the workplace.

What Is a Psychiatric Disability Under the ADA?

EEOC's title I regulations discuss psychiatric disabilities briefly in the context of requirements relating to mental impairments.[8] However, the 1997 EEOC enforcement guidance on psychiatric disabilities provides an indepth discussion that begins by stating:

> The workforce includes many individuals with psychiatric disabilities who face employment discrimination because their disabilities are stigmatized or misunderstood. Congress intended Title I of the Americans with Disabilities Act (ADA) [citation omitted] to combat such employment discrimination as well as

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Act, undated (hereafter cited as Office of Technology Assessment, *Psychiatric Disabilities, Employment, and the ADA*).

[5] Ibid., pp. 100–05.

[6] *See* discussion below. *See also* Quinn Wood and L.C. Crapo, "The World According to the EEOC: Psychiatric Disabilities and the ADA," *Utah Employment Law Letter*, vol. 2, no. 12 (June 1997); Jerry Adler, "My Brain Made Me Do It," *Newsweek*, Jan. 26, 1998, p. 56; Robert L. Dunston, "EEOC Guidance on Psychiatric Disabilities Sparks Controversy," *Employment Testing—Law & Policy Reporter* (July 1997), p. 105; James P. Fitzpatrick, "Psychological Disabilities in Workplace Present Many Tough Questions Under ADA," BNA's Employment Discrimination Report, pp. 195-96 (Aug. 6, 1997); Jacquie Brennan, "ADA Rules are More Balanced Than the Critics," The National Law Journal, June 30, 1997, p. A16 (hereafter cited as Brennan, "ADA Rules are More Balanced Than the Critics"); Mary T. Giliberti, "The EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities: Much Ado and Long Overdue," National Institute on the Americans with Disabilities Act, A Publication of the American Bar Association Center for Continuing Legal Education and the Section of Labor and Employment Law, Section of Tort and Insurance Practice, pp. B–2, B–6.

[7] Paul Steven Miller, Commissioner, EEOC, remarks at Government Training Institute's National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act, Jan. 12–13 1998, Arlington VA (hereafter cited as Remarks of Commissioner Miller, EEOC, National Symposium on Psychiatric Disabilities).

[8] *See* 29 C.F.R. § 1630.2(h) (1997).

> the myths, fears and stereotypes upon which it is based. [citation omitted][9]

In the introductory section of this guidance, EEOC quotes the statute in explaining that a mental impairment under the statute includes "any mental or psychological disorder, . . . emotional or mental illness."[10] Examples of such impairments are major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders. These impairments are catalogued in the current edition of the American Psychiatric Association's *Diagnostic and Statistical Manual IV* (*DSM–IV*).[11]

EEOC's guidance notes that the *DSM–IV* has been recognized as an important reference by the courts and is used widely by American mental health professionals for diagnostic and insurance reimbursement purposes.[12] The guidance states that the *DSM–IV* has been used by the courts and mental health professionals as a relevant source of information for identifying the existence of an impairment under the ADA.[13] For example, one court deciding a case involving a police officer suing the City of Chicago cited the ADA's legislative history in suggesting that Congress only intended mental disorders as defined in the *DSM* to qualify as "mental impairments" potentially covered by the ADA.[14]

Identifying and Diagnosing Psychiatric Disabilities

The American Psychiatric Association's *DSM–IV* catalogs many kinds of psychiatric impairments. Among the most common and the hardest to recognize are depression and anxiety disorders. An estimated 20 percent of the population will suffer an episode of severe depression in their lifetime. According to the *DSM–IV*, there are 12 different kinds of anxiety disorders, with varying prevalence rates.[15] These include post-traumatic stress disorder, obsessive-compulsive disorder, and acute stress disorder.[16] Mental disorders, including psychiatric disabilities, have represented a significant percentage of the employment discrimination charges filed under the ADA.[17]

The guidance's reference to the *DSM–IV* has been one of its most controversial aspects. The guidance states that the *DSM–IV* "is relevant for identifying these disorders."[18] It also states that not all conditions listed in the *DSM–IV* are disabilities, or even impairments, for purposes of the ADA.[19] For example, the *DSM–IV* lists several conditions that Congress expressly excluded from the ADA's definition of disability.[20]

The guidance, however, notes that the *DSM–IV* includes conditions that are not mental disorders, but for which people may seek treatment, such as problems with a spouse or child.[21] As stated in the guidance, because these conditions

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[9] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," p. 1.

[10] Ibid., pp. 2–4 [ADA Manual, 12:1281–82].

[11] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," pp. 2–4 [ADA Manual, 12:281–82] (citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (Washington, DC: American Psychiatric Association, 1994) (hereafter cited as APA, *DSM*–IV)).

[12] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," p. 3.

[13] Ibid.

[14] Dertz v. City of Chicago, 1997 U.S. Dist. LEXIS 1956, *21–*22 (N.D. Ill. 1997).

[15] *See* APA, *DSM–IV*, pp. 393–444. For example, the *DSM* states that the prevalence of panic disorder is somewhere between 1.5 and 3.5 percent; obsessive compulsive disorder is found in 2.5 percent of the general population; post-traumatic stress syndrome ranges anywhere from 1 to 14 percent.

[16] Ibid., p. 393.

[17] See Office of Technology Assessment, *Psychiatric Disabilities, Employment, and the ADA*, p. 3. The report notes that: "In the first 15 months after the ADA went into effect, 17,355 employment discrimination charges were filed with the U.S. Equal Employment Opportunity Commission (EEOC); nearly 10 percent of these charges—1,710—related to mental disorders. . . . That mental disorders accounted for the second largest block of charges, as broken down by type of impairment, hints at the importance of the issue of employment to people with psychiatric disabilities." Ibid.

[18] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," pp. 2–4, [ADA Manual, 12:1281–82].

[19] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," p. 3 [ADA Manual, 12:1282].

[20] 29 C.F.R. § 1630.3(d)–(e) (1997) states that [d]isability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs, and "homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part." *Id.* at § 1630.3(e).

[21] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," pp. 3–4 [ADA Manual, 12:1282].

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are not disorders, they are not impairments under the ADA.[22] Nonetheless, erroneous reports in the national news media stating that EEOC was using the guidance to require employers to recognize every single disorder catalogued in the *DSM–IV* gained as much publicity as the guidance itself. One nationally syndicated columnist stated that "the EEOC has made clear that anything listed in the Diagnostic and Statistical Manual will qualify [as a disability]. There are no fewer than 374 disorders identified in the *DSM*."[23] Although it is true that there are 374 disorders in the *DSM–IV*, the rest of this statement is absolutely wrong. The guidance states plainly that "not all conditions listed in the *DSM–IV* are disabilities within the meaning of the act."[24]

EEOC's guidance does not mention other valuable texts used to classify mental disorders, such as the *International Classification of Diseases* and the *Guides to the Evaluation of Permanent Impairment, Fourth Edition*. Thus, although the guidance states that the *DSM–IV* may be a relevant source for identifying psychiatric disorders, it does not specify clearly whether or not other sources also may be.[25] This has led to concerns in the psychiatric community that the guidance may be facilitating a proliferation of ADA claims based on fanciful mental illnesses not covered in the *DSM–IV*[26] or the other texts, but simply fabricated or imagined. Thus, one criticism of the guidance has been that it should clarify whether *DSM–IV* is the only relevant source, or if EEOC decides that it is not, it should identify clearly all of the "relevant" diagnostic texts acceptable for identifying mental disorders that may be covered under title I.[27] In addressing concerns of clinicians relating to the use of the term "relevant" with regard to the *DSM–IV*, an EEOC official has explained that this term must be understood as a legal term that is used to evaluate evidence.[28] It is not a judgment as to the *weight* or importance a court will accord this evidence.

A second controversial aspect of the guidance has been its mention of traits or behaviors, such as job-related stress, irritability, chronic lateness, or poor judgment, and perhaps even violence. One critic has written that the guidance states that the ADA requires employers to tolerate these traits in employees because the employees may claim that the trait is a symptom of a psychiatric disability.[29] However, the guidance does not make this statement. In fact, the guidance says that these traits are not, in themselves, mental impairments.[30] They can, however, be linked to mental impairments, although, even then, a mental impairment does not rise to the level of a disability under the ADA unless it substantially limits a major life activity of the specific individual with the disability. Plainly, the guidance does not indicate that the presence of these traits automatically triggers the protection of the ADA.[31]

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[22] Ibid.

[23] *See* Mona Charen, "Frenetic Guidelines Straight From EEOC," *The Washington Times*, Jul. 31, 1997, p. A14.

[24] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," p. 3.

[25] James J. McDonald, Jr., and Jonathan P. Rosman, "EEOC Guidance on Psychiatric Disabilities: Many Problems, Few Workable Solutions," p. 8 in Government Training Institute, *National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act*, Jan. 12–13 1998, Arlington VA (hereafter cited as McDonald and Rosman, "EEOC Guidance on Psychiatric Disabilities"); David R. Price, "Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act," pp. 3–4 in Government Training Institute, *National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act*, Jan. 12–13 1998, Arlington VA (hereafter cited as Price, "Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act"); James J. McDonald, Jr., and Ronald M. Broudy, "Job Stress and the ADA," p. 68 in Government Training Institute, *National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act*, Jan. 12–13 1998, Arlington VA.

[26] McDonald and Rosman, "EEOC Guidance on Psychiatric Disabilities," p. 8.

[27] Ibid.

[28] Carol Miaskoff, Assistant Legal Counsel, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 7, 1998, p. 2 (hereafter cited as Miaskoff interview).

[29] *See* "New EEOC Rules Hurt Mentally Ill," *Atlanta Journal and Constitution*, May 1, 1997, p. 18A. The editorial states: "the EEOC sets forth a list of requirements for employers that equate to lower work standards. For example, employers must: tolerate chronic lateness, poor judgment and hostility toward co-workers." Ibid.

[30] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," p. 6 [ADA Manual, 70:1283].

[31] *See generally* Miaskoff interview. *See* Palmer v. Circuit Court, 117 F.3d 351 (7th Cir. 1997).

Personality Disorders as Disabilities

EEOC's guidance states that certain personality disorders listed in the *DSM–IV* may be covered as psychiatric disabilities under title I, if they rise to the level of a "disability" by substantially limiting one or major life activities.[32] Examples of personality disorders include paranoid personality disorder, antisocial personality disorder, borderline personality disorder, histrionic personality disorder, narcissistic personality disorder, and obsessive-compulsivepersonality disorder.[33]

Because personality disorders are based on a collection of traits, specific traits may be associated with specific personality disorders. For example, an individual who exhibits rude, obnoxious behavior may be someone suffering from antisocial personality disorder. Personality disorders potentially are covered under the ADA, according to EEOC's enforcement guidance, and an employee conceivably could claim discrimination on the basis of his or her antisocial personality disorder as long as he or she can show that the disorder results in a substantial impairment to a major life activity.

Some clinicians in the psychiatric field disagree with inclusion of personality disorders listed in the *DSM–IV* as impairments that may amount to psychiatric disabilities under title I, largely because of concerns about the *behaviors* and actions of people with these illnesses.[34] These clinicians have claimed that whether or not a particular behavioral trait such as obnoxiousness or rudeness is covered is not entirely clear in the guidance. For example, since the guidance lists personality disorders as one of the covered mental impairments, "obnoxious" behavior may be covered if a claimant can show that this trait is a symptom of a personality disorder and the behavior does not technically violate any office rules or policies. The same would apply to a host of other disruptive behaviors resulting from a personality disorder, such as histrionic personality disorder, paranoid personality disorder, or narcissistic personality disorder.[35]

The guidance generally is clear on the issue of violent or threatening behavior. If an employer terminates an employee exhibiting these traits, as long as this is a uniformly applied disciplinary action that is job related and consistent with business necessity, the employer may do so without violating the ADA.[36] This employee represents a potential "direct threat." At a minimum, the employee who engages in violent behavior is no longer a "qualified" individual with a disability.[37] EEOC has stated in other policy guidance that "if the discipline is discharge, the employer need not reverse the discharge as an accommodation . . . [I]t is not a reasonable accommodation to forgive misconduct or to reverse discharge . . . employers may hold all employees to the same performance and conduct standards."[38]

The only aspect of the guidance's discussion on violence that is somewhat troubling arises from the unclear language used in one of the examples. In the example, an employee has a hostile altercation with his supervisor and threatens the supervisor with physical harm. The supervisor immediately terminates the employee with, as the ADA requires, a uniformly applied policy that is job related and consistent with business necessity. The terminated employee asks for a month off for treatment instead. This is the first time the employee ever mentioned having a mental disability or requested an accommodation. The guidance states: "The employer is not required to *rescind* the discharge *under these circumstances*. . . ."[39] This language is troubling because it suggests that there are certain circumstances in which the employer would have to rescind the discharge.

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[32] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," pp. 2–4.

[33] APA, *DSM*–IV.

[34] McDonald and Rosman, "EEOC Guidance on Psychiatric Disabilities," pp. 8–9; Price, "Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act," p. 15.

[35] According to the guidance, an employee who has an antisocial personality disorder or other personality disorder has an "impairment" under the ADA. However, the employee must show that such an impairment rises to the level of a disability. The guidance makes clear that an employer can still hold an employee with a disability to the same standards of performance and conduct as other employees, provided that the standards are job related and consistent with business necessity, even if his or her misconduct is caused by disability. *See* Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), U.S. Commission on Civil Rights (USCCR), July 9, 1998, Comments of the U.S. Equal Employment Opportunity Commission, p. 12 (hereafter cited as EEOC Comments).

[36] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 29, 32 [ADA Manual, 70:1291].

[37] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 32 [ADA Manual, 70:1291].

[38] Peggy R. Mastroianni, Assistant Legal Counsel, ADA Policy Division, letter to Susan Gromis Flynn, Marcus & Shapira, Pittsburgh, PA. re: response to inquiry about ADA, Mar. 22, 1994 reprinted in 5 NDLR 287.

For instance, if this employee had claimed a disability and requested accommodation *before* the incident, would the employer then have to allow the employee to return to work? Suppose the employee had informed his supervisor that he suffered from "explosive personality disorder," a condition that severely limits his ability to interact with or maintain relationships with other people. Suppose also that the employee had asked for and received time off for treatment. Nonetheless, upon returning to work, he became engaged in a physical altercation in which he broke a coworker's jaw. Can the employer fire him on the spot, as company policy dictates? The answer may be yes, since refraining from violence generally is considered an essential function of any job and is one that this employee now is unable to perform. Also, the employee could be considered a direct threat to others. However, the question is, would this employer actually need to invoke these defenses to the ADA because this employee previously had informed the employer of his psychiatric disability? The guidance is silent on this point. EEOC should clarify the language of this example.

In the above example, the employee suggested that his violent behavior was a symptom of a personality disorder. Symptoms of personality disorders are *behaviors* and *actions* that can be inappropriate for the workplace. By declaring personality disorders potential disabilities under the ADA, EEOC has raised the question of whether employers have to accommodate these behaviors just as an employer must accommodate hearing loss or vision loss. Two commentators have wondered whether EEOC is requiring an employer to accommodate behaviors such as the paranoid employee's penchant for spreading false and destructive rumors, the borderline employee's manipulation of supervisors and coworkers, the histrionic employee's sexually provocative dress and innuendo, or the narcissistic manager's insensitivity and denigration of subordinates.[40]

Traits and behaviors associated with particular personality disorders, like those mentioned above, would surely be inappropriate in an office setting. However, they may fall short of breaking the office conduct code. In addition, if the employer responds by making the specific behavior a conduct violation, the employee may claim this response is an element of discrimination on the basis of his or her disability. Moreover, if the claimant can show that making his or her ostensibly *disability*-related behaviors a conduct violation is not a decision consistent with business necessity or job related, he or she may have a viable ADA claim. Finally, personality disorders, because they are based on *behaviors* and *actions*, may lend themselves particularly well to meritless claims from employees falsely attributing unwelcome behaviors to such conditions. However, whether the behaviors are bona fide symptoms of a personality disorder or not, the guidance's assertion that personality disorders are potential disabilities under the ADA may mean that employers must use time and financial resources to address such claims. Based on these concerns, it is not unreasonable to question whether it is necessary for the guidance to identify personality disorders as potentially protected under the ADA, thereby suggesting the need to seek accommodation for what would normally be considered behaviors inappropriate in an office setting.

At a national symposium on EEOC's enforcement guidance on psychiatric disabilities, EEOC Commissioner Paul Miller addressed these concerns. He stated that the violent or threatening employee or the "obnoxious jerk" is not protected by the ADA and attributed the suggestion that it is protected to negative and false stereotypes of people with mental disabilities portrayed in the media. Commissioner Miller stated:

> The media's response to the issue of EEOC's policy guidance on the ADA and psychiatric disabilities reflected stereotypical thinking at its worst. It trivialized the very real discrimination confronting people with mental disabilities. The media, for the most part, failed to acknowledge that the threat of work-

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[39] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 32 [ADA Manual, 70:1291] (emphasis added).

[40] McDonald and Rosman, "EEOC Guidance on Psychiatric Disabilities," pp. 9–10.

place discrimination is so great that many individuals with mental disabilities fear that their disability will become disclosed to their employer and do not request the reasonable accommodation that they need. Rather, the media chose to focus on the so-called crazed lunatics who are somehow out there in the workplace and whom people should fear. Most people with mental disabilities in the workplace are not violent. It is important to note that the violent or threatening employee or the obnoxious jerk are not individuals who fall under the ADA protections, as EEOC's guidance clearly explains. These people are not qualified individuals and the ADA offers them no coverage in hiring and no protection against being fired once employed. Media depictions often ignore the fact that people with mental disabilities are not violent and that the ADA does not require the employer to accept conduct that is a direct threat to the health and safety of the employee or others in the workplace.[41]

"Substantial Limitation of a Major Life Activity" Analysis and Psychiatric Disabilities

EEOC's enforcement guidance notes that in determining whether an impairment is covered under the ADA, "generalizations about the conditions should not be relied upon. It is important to ascertain how the specific individual is affected by the impairment."[42] The guidance is less clear in conveying standards for establishing when a given mental impairment can be considered a disability for the purposes of the ADA. This is due in part to the use of subjective language. For example, the guidance states: "An impairment does not significantly restrict major life activities if it results in only mild limitations."[43] The guidance does not provide any further clarification on what constitutes a "mild" limitation.

Elsewhere, the guidance states that, at a minimum, a claimant must show that the mental impairment from which he or she suffers substantially limits a major life activity. Even if a condition is an impairment, it is not automatically a disability within the meaning of the ADA. To be covered under the ADA, an impairment must substantially limit one or more the major life activities.[44] The guidance uses "the average person in the general population" as a standard of comparison for determining whether a given individual has a substantial limitation of a major life activity.[45] The guidance applies this standard to specific major life activities, such as interacting with others, concentrating, and sleeping.[46] This standard is an accepted one that is used by EEOC to determine substantial limitation both for physical and mental impairments.[47] However, this standard may be better suited to physical rather than mental impairments. For example, in the context of psychiatric disabilities, this standard, along with other terminology used to describe measures of substantial limitation, has been criticized as too generalized and imprecise.[48]

Although the guidance states that the presence of a disability will not be based on "generalizations about conditions," the guidance then uses "the average person in the general population" as the standard for determining whether an individual's impairment substantially limits a major life activity.[49] This standard is based on a large generalization. Moreover, as two commentators, one a labor and employment lawyer, the other a psychiatric clinician, have stated:

> determining whether someone is substantially limited in the major life activity of, for example, walking or hearing, is a fairly straightforward task. The former would be apparent to the naked eye; the latter may be ascertained via some simple audiology tests. Determining whether a person is substantially limited in the major life activity of "thinking" or "interacting with others" is another story.[50]

The authors of this statement observe that it is easy to measure the pace at which the average

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[41] Remarks of Commissioner Miller, EEOC, National Symposium on Psychiatric Disabilities.

[42] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 5–6 [ADA Manual, 70:1283] [emphasis added].

[43] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 6 [ADA Manual, 70:1283].

[44] 42 U.S.C. § 12102(2)(A) (1994).

[45] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 6 [ADA Manual, 70:1283] citing 29 C.F.R. § 1630.2(j) (1996).

[46] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 10–12 [ADA Manual, 70:1284].

[47] *See* EEOC, "Section 902—Definition of the Term 'Disability,'" § 902.4 (hereafter cited as EEOC, "Definition of the Term 'Disability'").

[48] Price, "Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act," p. 22.

[49] Ibid.

[50] McDonald and Rosman, "EEOC Guidance on Psychiatric Disabilities," p. 11.

person walks or how well the average person sees or hears. It may be more difficult to determine an average person's ability to think or concentrate. For example, suppose an attorney working in a law firm experiences an inability to think clearly or concentrate for long periods of time caused by a traumatic head injury. The determination as to whether he was substantially limited in thinking or concentrating would be made entirely on the basis of credible testimony from coworkers and family, and perhaps a doctor's judgment. However, the "average person in the general population" standard probably would not factor into this determination; such data do not exist. In addition, this generalized standard seems oddly at variance with Congress' and EEOC's "individualized" and "case-by-case" approach in implementing the ADA. The practical value of this standard seems limited. At a minimum, the "general population" element might be narrowed in some way.

Finally, the guidance addresses major life activities themselves, stating they may include thinking, concentrating, interacting with others, and sleeping,[51] which appears consistent with the legislative intent of the ADA.[52] However, neither concentrating nor sleeping is mentioned in the ADA regulations and are newly recognized as major life activities in this guidance.[53]

EEOC's inclusion of these activities as "major life activities" has been opposed by some courts.[54] For example, the First Circuit in *Soileau v. Guilford of Maine, Inc.*,[55] disagreed with EEOC's inclusion of "interacting with others." In *Soileau*, an industrial process engineer fired from his job claimed that his employer discriminated against him because of his disability. He claimed that he was disabled within the meaning of the ADA because his diagnosed depressive disorder interfered with his ability to interact with others. The *Soileau* court held, however, that impairment of the ability to get along with others is not a major life activity and is therefore insufficient to trigger ADA coverage. The court said: "To impose legally enforceable duties on an employer based on such an amorphous concept would be problematic."[56]

However, some Federal trial courts have given deference to EEOC's guidance on the issue of interacting with others as a major life activity. For example, in *Krocka v. City of Chicago*,[57] the court rejected the defendant's argument that the plaintiff was not substantially limited in a major life activity. In denying the defendant's motion for summary judgment, the court found that "interacting with others" was a major life activity that may have been substantially limited as a result of the defendant's long term depression.[58] The court cited the EEOC Compliance Manual for the proposition that interaction with others is a major life activity.[59]

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[51] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 5 [ADA Manual, 70:1282].

[52] *See* H. REP. NO. 101–485(II), at 62 (1990) (stating: "A 'major life activity' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities." *Id.*). *See also* EEOC, "Definition of the Term 'Disability'," § 902.3 (citing thinking, concentrating, and interacting with others as major life activities).

[53] *See* Carl Brown, Assistant Commissioner, Division of Rehabilitation Services, Department of Human Services, State of Tennessee, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, attachment, p. 1 (stating: "EEOC's guidelines regarding psychiatric disabilities issued in the Spring of 1997 does not accurately reflect the intent of Congress in enacting ADA. Losing sleep was not intended to be a major life activity. This guidance should be clarified.").

[54] *See* Soileau v. Guilford of Maine, Inc., 105 F.3d 12 (1st Cir. 1997); Breiland v. Advanced Circuits, Inc., 976 F. Supp. 858, 863 (D. Minn. 1997) (agreeing with *Soileau* in rejecting the notion that ability to get along with others was a major life activity under the ADA).

[55] 105 F.3d 12 (1st Cir. 1997).

[56] *Id.* at 15.12 The court also stated with respect to the concept of "interacting with others" as a major life activity: "The concept of 'ability to get along with others' is remarkably elastic, perhaps so much so as to make it unworkable as a definition. While such an ability is a skill to be prized, it is different in kind from breathing or walking, two exemplars which are used in the regulations. Further, whether a person has such an ability may be a matter of subjective judgment; and the ability may or may not exist depending on context. Here, Soileau's alleged inability to interact with others came and went and was triggered by vicissitudes of life which are normally stressful for ordinary people—losing a girlfriend or being criticized by a supervisor. Soileau's last depressive episode was four years earlier, and he had no apparent difficulties in the interim." *Id.*

[57] *See* 969 F. Supp. 1073 (N.D. Ill. 1997).

[58] The court construed the ADA list as not exhaustive and used as a source EEOC's definition of disability in section 902-10 n. 11 of the Compliance Manual. The issue of major life activity will be decided as a matter of fact during a later trial. The issue will not be whether "interacting with others" is a major life activity, but whether the plaintiff's inability to get along with others was in fact due to his depression and not just a personality conflict. *See id.* at 1083–85.

A claimant does not need to show that he or she is substantially limited in the major life activity of working if he or she is substantially limited in another activity.[60] EEOC regulations require that the claimant show that he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities."[61] In addition, the regulations state: "The inability to perform a single, particular job does not constitute a substantial limitation to the major activity of working."[62] The claimant with a mental impairment or condition may have significantly more difficulty meeting the requirement of this provision. For example, a claimant with a physical problem such as a back impairment may be able to show easily that he or she cannot perform a class of jobs that requires lifting heavy weights, while the individual with a behavioral or anxiety disorder may have much greater difficulty meeting the same requirement.[63]

The Federal courts have ruled whether specific psychiatric illnesses are disabilities within the meaning of the ADA by relying on EEOC regulations, policy guidance, and case precedent from the Rehabilitation Act.[64] For example, in a Rehabilitation Act case involving a utility systems repairer who suffered from acrophobia,[65] the repairer informed his supervisor that he could not climb to certain heights because of his phobia. Two months later, he was terminated because he was "medically unable to perform the full range of the duties of [his] position."[66] The Fourth Circuit held that the condition left the repairer incapable of satisfying the *singular* demands of a *particular* job, but that he had failed to establish that he was unable to perform a broad range of jobs, as required under the law.[67]

Complainants like the repairer in the above case are in a difficult position. They may suffer from an impairment, such as a specific phobia that renders them incapable of performing a particular job function. However, such claimants may not have the option of showing that their specific phobia impedes the ability to perform a major life activity as it has been defined under the statute. For example, the repairer suffered from a fear of heights, but it would be difficult to make the argument that climbing heights is a major life activity in and of itself. Therefore, the repairer had to make the argument that he was substantially limited in the major life activity of working. To do that he had to meet a very high standard, namely, that the substantial limitation carried across "a broad range of jobs" as required under both the Rehabilitation Act and the ADA. As a result, he and others like him who suffer from psychiatric disabilities that impede their ability in one area may be presented with serious difficulties in claiming protection under the ADA.[68]

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[59] *Id* at 1084 n. 8. *See also* Stauffer v. Bayer Corp., 1997 U.S. Dist LEXIS 14468 (N.D. Ind. 1997) (assuming, without deciding, that interacting with others is a major life activity but finding no disability because limitations were not substantial).

[60] 29 C.F.R. pt. 1630 app. § 1630.2(j) (1997). *See also* EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 5–6 [ADA Manual, 70:1282].

[61] 29 C.F.R. § 1630.2(j)(3)(I) (1997).

[62] *Id.*

[63] *See* John M. Casey, "From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans with Disabilities Act", *Puget Sound Law Review*, vol. 17 (Winter 1994), p. 382 (stating "[c]onditions such as behavioral disorders, a type of mental disability, are often less apparent to employers than are most obvious forms of mental disability. Yet such hidden behavioral disorders are a potentially greater source of stigma, employer indifference, and, ultimately, job termination. The ADA fails to address behavior disorders in general and phobias in particular." Ibid.).

[64] *See* 42 U.S.C. § 12201(a). ADA relies on the same standards set forth by administrative regulations and court cases. Congress in the ADA stated that "except otherwise provided. . .nothing in [the ADA] shall be construed to apply a lesser standard than that applied under title V of the Rehabilitation Act of 1973. . .or the regulations issued by Federal agencies pursuant to such title." *Id.*

[65] Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

[66] *Id.* at 933.

[67] *Id.* at 935. As under the Rehabilitation Act, with reference to the substantial limitation of working the EEOC regulations state that "The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2j(3)(I) (1997).

[68] *See, e.g.,* Pouncy v. Vulcan Materials Company, 920 F. Supp. 1566 (N.D. Ala. 1996) (the court found that because any perceived mental impairment only limited plaintiff's ability to perform her current job, and did not limit ability to perform a broad range of jobs, the plaintiff was not covered under the ADA).

Evidence of Psychiatric Disability

The guidance states that an EEOC investigator can determine whether an impairment is substantially limiting based on "credible testimony," including self-reporting by the claimant and information from family, friends, and coworkers.[69] From this statement, it appears that no independent evaluation by a mental health professional is necessary and an EEOC investigator may rely solely on the word of the claimant. The guidance makes clear later that an employer may ask for reasonable documentation about a disability.

One psychiatric clinician has said that it is problematic that the guidance states that self-reporting may be credible by itself. He asserts that other documents, such as reports by psychiatrists, psychologists, or other mental health professionals, may be needed to establish the presence of a mental disorder.[70] Both the American Medical Association's (AMA) *Guides* and the Social Security Administration (SSA) regulations[71] emphasize the necessity for the contributions of mental health professionals in addition to self-reporting and family members' reports:

> The SSA's evaluation system and most other systems require the existence of an impairment that is established and documented by medical evidence relating to signs, symptoms, and results of laboratory tests including psychological tests. In general, the diagnosis of a mental disorder should be justified by history, signs, and symptoms and a diagnosis according to DSIII–R should be given. If there is an uncertainty about the exact diagnosis, a differential diagnosis should be discussed.[72]

The guidance states that common personality traits, such as poor judgment, irritability, or chronic lateness, without more, would not be evidence of a mental impairment.[73] However, the guidance notes that if a common personality trait can be linked to a mental impairment, EEOC might consider the trait a symptom of a mental illness.[74] This statement appears to conflict with the position that self-reporting and the observations of family and friends will suffice to establish the presence of a mental disorder, since such observations would have little credibility in establishing the link between a common trait and a mental illness without the diagnosis of a mental health professional. In a previous guidance, "Definition of the Term 'Disability'," EEOC states that medical documentation "is a good starting point for determining the extent to which a physical or mental impairment limits any of the charging party's major life activities."[75] This would seem to be even more relevant for psychiatric disabilities, yet, the guidance on psychiatric disabilities does not refer to this point.

EEOC's discussion on showing substantial limitation for a psychiatric disability is weak because it is vague. The only language in the guidance on this point is "[c]redible testimony from the individual with a disability and his/her family members may suffice."[76] The guidance might provide examples of what kind of evidence establishes "credible testimony." Since the guidance states that the individual/family's testimony "may suffice" in establishing that an impairment is substantially limiting, what other evidence might be important? The guidance is unclear on these points.

Reasonable Accommodation

EEOC's guidance discusses reasonable accommodation as it applies to people with psychiatric disabilities.[77] EEOC's Associate Legal Counsel stated with respect to the discussion:

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[69] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," p. 6 [ADA Manual, 70:1282]. One court has held that the disclosure of a disability by a family member is not enough to establish a request for accommodation. In *Miller v. National Casualty Co.*, the court held that although an employee's sister told a supervisor's secretary that her sister was "mentally falling apart," this did not amount to a request for reasonable accommodation when the employee herself had never revealed her impairment or requested an accommodation until after she was fired. 61 F.3d 627, 630 (8th Cir. 1995).

[70] Price, "Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act," pp. 19–20.

[71] *See* 20 C.F.R. § 404.1513 (1997).

[72] Price, "Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act," pp. 19–20.

[73] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," pp. 4–5 [ADA Manual, 70:1282].

[74] Ibid.

[75] EEOC, "Definition of the Term 'Disability'," § 902.4(c)(1) [ADA Manual 70:1142].

[76] EEOC, "Enforcement Guidance for ADA and Psychiatric Disabilities," p. 6 [ADA Manual, 70:1282].

[77] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 19–29 [ADA Manual, 70:1287–1290].

"We wanted to answer everybody's questions. . . . To quite a degree, the guidance liberates people to ask for accommodations, which [is] certainly an important thing."[78] To this end, the guidance's discussion on reasonable accommodation addresses several key issues.

The first issue the guidance addresses is: what constitutes a request for reasonable accommodation? The guidance explains that an individual or his/her representative must let the employer know that the individual needs "an adjustment or change at work for a reason related to a medical condition."[79] The individual does not need to put the request in writing, nor does the employee need to use the words "accommodation" or "disability." An employee's family member may make the request on the employee's behalf.[80]

The guidance effectively explains the application of reasonable accommodation to people with psychiatric disabilities, particularly by using specific examples to illustrate its points.[81] These examples provide helpful insights into how the theory of reasonable accommodation might apply to a person with a mental disability. The guidance provides an example to address the question of whether an employee needs to present documentation when requesting a reasonable accommodation. In the example, an employee tells his supervisor that he is "stressed and depressed" and needs some time off. In this case, because the employee's request for accommodation is not based on an obvious need, the employer may request *reasonable* documentation.[82] This might consist of asking the employee to sign a limited release allowing the employer to submit a list of questions to the employee's health care professional.[83] Another example the guidance offers is the case of an individual who needs to drink beverages approximately once an hour to combat the dry mouth caused by his psychiatric medication. This person must request reasonable accommodation for a change in workplace policy so that drinking beverages is allowed at workstations.

The guidance also discusses selected types of reasonable accommodation for employees with psychiatric disabilities.[84] Among the accommodations noted are modified work schedules, physical changes to the workplace, modification of workplace policy, adjusting supervisory methods, employing a job coach, and, in certain, cases, reassignment. However, it is not a reasonable accommodation to ensure that an employee takes his or her medication.[85] Employers have no obligation to monitor medication, because this is not a barrier unique to the workplace; it is related to the employee's life outside the workplace as well.

The reaction to the discussion and analysis of reasonable accommodation has been mixed. The National Federation of Independent Business (NFIB) in Washington, D.C., a lobbying organization representing small and independent businesses, has criticized the guidance.[86] One official of NFIB stated that she thought that the guidance was not comprehensive enough on the reasonable accommodation issue;[87] for instance, the guidance did not provide examples of accommodations for specific psychiatric disorders such as schizophrenia, which is harder to accommodate than a physical disorder.[88]

The list of potential reasonable accommodations in the EEOC guidance has been another source of controversy. This controversy is illustrated by a hypothetical scenario derisively sug-

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[78] Lois C. Rose, "Commission Counsel Calls EEOC Guidance on Psychiatric Disabilities 'Enlightened' Start," *BNA's Daily Labor Report*, Mar. 11, 1998, p. C–1 (hereafter cited as Rose, "Commission Counsel").

[79] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 19–20 [ADA Manual, 70:1287].

[80] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 19–21 [ADA Manual, 70:1287].

[81] *See* EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 19–29 [ADA Manual, 70:1287–1290].

[82] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 22–23 [ADA Manual, 70:1288].

[83] Ibid.

[84] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 23–28 [ADA Manual, 70:1288–1290].

[85] *See also* Christopher G. Bell, "The Americans with Disabilities Act, Mental Disabilities, and Work," in *Mental Disorder, Work Disability, and the Law*, eds. Richard J. Bonnie and John Monahan, eds. (Chicago, IL: University of Chicago Press, 1997), pp. 211–17 (hereafter cited as Bonnie and Monahan, *Mental Disorder, Work Disability, and the Law*).

[86] Mary Reed, Manager, Legislative Affairs (House Spokesperson), National Federation of Independent Business, telephone interview, Jan. 14, 1998, p. 2 (hereafter cited as Reed interview) (stating that NFIB influences the development and content of public policy affecting small and independent businesses).

[87] Ibid.

[88] Ibid.

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gested by two critics.[89] In the scenario, an employee suffering from an anxiety disorder says that his mind wanders frequently and that he is often distracted by irrelevant thoughts. As a result, he continually makes errors on detailed or complex tasks. His doctor says that the errors are caused by his anxiety disorder and may last indefinitely.

According to EEOC's policy guidance, this individual would have a disability within the meaning of the ADA because he has an impairment, an anxiety disorder, that substantially limits him in the major life activity of concentrating. The employer would be obligated to provide reasonable accommodation for this employee. According to the two critics, such accommodation could include providing "a temporary job coach to assist in training this otherwise qualified person with a disability to perform the essential functions of his/her job!"[90] These critics note: "This is only one example of how counterintuitive the 36-page guidance at times appears to be."[91]

These critics are correct in stating that the guidance considers anxiety disorders as potential disabilities, that the guidance includes "concentrating" as a major life activity, and that it states that the provision of a temporary job coach is a possible reasonable accommodation. However, they neglect to mention that the guidance does not require a temporary job coach *or any reasonable accommodation* where such accommodation would create an undue hardship on the employer.[92] In addition, any accommodation, including a temporary job coach, must allow the employee to meet the essential functions of the job, or the employee can no longer be considered qualified.

The guidance states that employers are not required to eliminate essential job functions to accommodate an employee with a mental disability.[93] The guidance illustrates this point with the court case of a senior level attorney who suffered from chronic depression and severe personality disturbance and who requested less complex assignments, more supervision, and an exemption from doing appellate work.[94] The court found that he was not a qualified individual because these were the essential duties of his senior level position.[95]

However, the guidance does not answer important questions relating to reasonable accommodation. One EEOC official has predicted some "second-stage" issues that the agency might begin to address in future guidance.[96] For example, the guidance does not address the issue of documentation to show the medical need for an accommodation, specifically how much information the employer is entitled to get under the ADA, and from whose doctor the information can come, the employer's or the employee's doctor. A second issue that the guidance does not discuss is the reasonable accommodation process. For example, in the interactive process that courts require to reach a reasonable accommodation, does the employer or the employee have to suggest a potential accommodation? Another question on this issue is, in cases where reassignment might be appropriate, is it the employer's responsibility to identify possible job vacancies? Another issue not discussed in the guidance is whether there is a continuing requirement for reasonable accommodation if one or more accommodations are attempted and prove unsuccessful. Finally, with respect to undue hardship, are there any ways to clarify its scope? For example, if a high level employee with a psychiatric disability needs a long term leave of absence, at what point does his or her absence amount to an undue hardship on the company?

Other commentary on ways to improve the guidance's treatment of the reasonable accommodation issue comes from the NFIB, which recommends that the statutory definitions for "undue hardship," "disability," and "readily achievable" be more specific.[97] The NFIB representative did not believe that this was EEOC's fault but rather the vagueness and ambiguity of the law itself.[98]

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[89] Quinn Wood and L.C. Crapo, "The World According to the EEOC: Psychiatric Disabilities and the ADA," *Utah Employment Law Letter*, vol. 2, no. 12 (June 1997).

[90] Ibid.

[91] Ibid.

[92] *See* 42 U.S.C. § 12112(b)(5)(A) (1994); 29 C.F.R. § 1630.15(d) (1997); EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 27.

[93] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 26–27, n. 62 [ADA Manual, 70:1289] (citing Bolstein v. Reich, 1995 U.S. Dist. LEXIS 731 (D.D.C.), *aff'd*, 1995 U.S. App. LEXIS 32536 (D.C. Cir. 1995) (attorney with chronic depression and severe personality disturbance was not a qualified individual with a disability because his requested accommodations of more supervision, less complex assignments, and the exclusion of appellate work would free him of the very duties that justified his current level)).

[94] Ibid.

[95] Bolstein, 1995 U.S. Dist. LEXIS 731, at *10–*12.

[96] *See* Rose, "Commission Counsel," p. C–2.

Conduct

The guidance states that any employee can be sanctioned for misconduct, regardless of disability status, as long as the conduct standard violated is applied uniformly to employees with and without disabilities, is job related, and is consistent with business necessity.[99] The information provided in this section of the guidance focuses on these requirements, emphasizing the importance of these concepts in analyzing the validity of ADA claims to protect individual rights and maintain fundamental fairness in the workplace.

To demonstrate the important distinction between conduct standards that are business related and those that are not, the guidance offers three examples.[100] In the first, an employee steals money from a cash register but claims his action was related to a mental disability. The employer may discipline the employee because the conduct standard, a prohibition against theft, is applied uniformly, job related, and consistent with business necessity.

In the second example, an employee with a disability tampers with and disables medical equipment. The guidance states that even if the action was a result of the employee's disability, the employer may impose disciplinary actions that are consistent with its disciplinary policies because the employee violated a standard of conduct. However, if the employer has not disciplined other, nondisabled employees for the same misconduct, the employer would violate the ADA if it disciplined the employee with a disability.[101]

In the third example, an employee in a warehouse who works loading boxes onto pallets for shipment has been appearing at work disheveled and unkempt as a result of his psychiatric disability. His work performance is good, but he is violating the neat appearance code and is rude and abrupt with coworkers. The guidance reasons that because this employee's work does not involve customer contact and requires very little contact with other workers, the appearance and courtesy rules are not job related or consistent with business necessity. Thus, rigid application of the neat appearance and courteous conduct standards to this employee would violate the ADA.[102]

Two commentators argue that "this is a bizarre interpretation of the ADA that runs counter to common sense as well as virtually every reported court decision on the subject."[103] These commentators state that, similar to workplace bans on violence or threats of violence, standards of courtesy always are essential to the efficient running of a business and therefore always are job related and consistent with business necessity.[104] Moreover, even if this employee has little contact with coworkers, if he is abrupt and rude when he is interacting with a coworker, this could lead to physical altercations.[105] Also, if another employee who suffers from an anxiety disorder complains that she experiences stress every time she has contact with the rude employee, a question exists as to which employee with a disability should be given preference.[106] As the commentators state, the EEOC guidance "assumes—quite unrealistically—that mental disabilities can be addressed in a vacuum."[107] EEOC's Associate Legal Counsel responded to this point, noting: "There is no basis for equating a courtesy standard—especially in a job requiring minimal social contact—with a workplace ban on violence or threats of violence."[108]

The guidance's discussion on conduct next addresses the issue of whether an employer must provide reasonable accommodation to an employee who previously has violated conduct standards that are job related and consistent with business necessity.[109] The guidance states that an employer must make reasonable accommodation for such an employee, barring undue hardship,[110] and illustrates this point with several examples. In one, a reference librarian loses her temper and engages in outbursts, including shouting at library patrons. After the second incident, she is disciplined with a suspension, at which time she discloses her disability to her supervisor and requests reasonable accommodation in the form of a leave of absence so that she can seek treatment. Under the ADA, her employer must grant her this accommodation, barring undue hardship.[111]

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[97] Reed interview. This is a position that NFIB took when the law was being drafted. Ibid.

[98] Ibid.

[99] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 29–30 [ADA Manual, 70:1290] (citing 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. §§ 1630.10, 1630.15(b)–(c) (1997)).

[100] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 29–30 [ADA Manual, 70:1290].

[101] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 30 [ADA Manual, 70:1290].

[102] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 29–30 [ADA Manual, 70:1290].

[103] McDonald and Rosman, "EEOC Guidance on Psychiatric Disabilities," pp. 15–16.

[104] Ibid., p. 16.

[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] *See* EEOC Comments, p. 13.

After the EEOC guidance was released, one management attorney expressed concern that the ADA would force employers to perform a very difficult "balancing act" in certain situations with their employees.[112] For example, if an employee engages in unacceptable behavior and his employer takes disciplinary action, the ADA would not be implicated.[113] However, if the employer intrudes any further by questioning whether there is a psychiatric condition underlying the employee's behavior, the employer may now have a problem.[114] The employee potentially could argue that he was perceived or "regarded as" being disabled and is covered under the ADA.[115] This attorney has cautioned that "employers enter a minefield if they initiate discussions about whether an employee has a psychological condition."[116]

This situation arose in the case of *Holihan v. Lucky Stores.*[117] In this case, a store manager, whose employees repeatedly complained about his abusive behavior, claimed that he was fired unlawfully because his supervisor regarded him as having a mental disability. The store manager believed that his supervisor regarded him as disabled because the supervisor asked if he could discuss the store manager's "aberrational behavior," asked him if he was having problems, and asked him to seek counseling. The Ninth Circuit decided that the store manager was entitled to a trial on his ADA claim because it found that a "reasonable jury" could infer that the employer regarded the manager as having a mental disability.[118]

Despite these concerns, EEOC's guidance is clear in stating that an employer is only responsible for accommodating the *known* disabilities of its employees.[119] This means that an employee must ask for reasonable accommodation *before* performance suffers or conduct problems occur.[120] If an employee who has not requested reasonable accommodation engages in abusive, threatening, or some other form of unacceptable behavior and the sanction his employer chooses is to fire him, the employee does not have a cause of action.

The ADA and EEOC title I regulations also are very clear in stating that the employer may impose the same discipline on a person with a disability as one without, as long as the disciplinary action taken is job related and consistent with business necessity.[121] In the case of violence or threats of violence, the EEOC guidance notes, "nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence."[122] Several courts have found that maintaining an acceptable standard of conduct generally is recognized as an essential function of any job.[123] Any individual engaging in abusive, violent, or threatening behavior, regardless of whether such an individual claims a psychiatric disability, may therefore be considered no longer capable of performing an essential function of the job and thus no longer "otherwise qualified," if a reasonable accommodation does not exist.[124]

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[109] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 30–32 [ADA Manual, 70:1291].

[110] Ibid.

[111] Ibid.

[112] James P. Fitzpatrick, "Psychological Disabilities in Workplace Present Many Tough Questions Under ADA," *BNA's Employment Discrimination Report*, p. 195 (Aug. 6, 1997).

[113] Ibid.

[114] Ibid.

[115] Ibid.

[116] Ibid.

[117] 87 F.3d 362 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1349 (1997).

[118] *Id.* at 366.

[119] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 19 n 45 [ADA Manual, 70:1287] (citing 42 U.S.C. §§ 12111(9), 12112(b)(5)(A) (1994); 29 C.F.R. § 1630.9 (1997); 29 C.F.R. pt. 1630 app. § 1630.9 (1997)).

[119] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 21–22 [ADA Manual, 70:1288].

[120] Ibid.

[121] 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. §§ 1630.10, 1630.15(c) (1997).

[122] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 29–30 [ADA Manual, 70:1290].

[123] Mancini v. General Electric Co., 820 F. Supp. 141, 147–48 (D. Vt. 1993) (finding that insubordinate employee could not perform essential function of following direction).

A recent case in the Fifth Circuit provides an excellent example of how EEOC's guidance is being adopted by the courts and how the conduct issues discussed in the guidance play themselves out in the real world every day in the workplace. In *Hamilton v. Southwestern Bell Telephone Company*,[125] the Fifth Circuit was presented with the case of a telephone company employee who was fired for verbally abusing and striking a female coworker. The Fifth Circuit held that, despite his contention that he suffered from post-traumatic stress disorder (PTSD), he had no claim under the ADA.[126]

The *Hamilton* court held that the plaintiff did not even have a disability within the meaning of the ADA and therefore his claim failed because he could not meet this threshold requirement. However, the court found that even if he did have a disability under the ADA, his claim would have failed because "[a]lthough Hamilton argues that the incident was caused by PTSD, we are persuaded that the ADA does not insulate emotional or violent outbursts blamed on an impairment."[127] Moreover, the court stated, Hamilton's discharge was "not discrimination based on PTSD but was rather his failure to recognize the acceptable limits of behavior in a workplace environment."[128]

These are the precise kinds of employee conduct issues EEOC analyzes in its guidance. EEOC and the Fifth Circuit agree that the ADA does not protect violent or threatening behavior in the workplace and that if immediate dismissal is the sanction, as long as it is uniformly applied, the ADA will not interfere with the employer's discretion. As EEOC states in its guidance:

> nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without disability.[129]

The only caveat EEOC adds to this rule is that if the sanction is not job related and consistent with business necessity, "imposing discipline under them could violate the ADA."[130] It would be rare, if not never, that some form of sanction for violent behavior in the workplace would be considered inconsistent with business necessity and not job related. Therefore, a policy of firing those who engage in violent behavior is not a violation of the act as long as it is implemented uniformly, against both individuals with disabilities and those without. The guidance does not make clear, however, whether, if an employee who has engaged in violent behavior related to his disability has put the employer on notice as to his disability, the employer might also have to conduct a direct threat analysis to ensure that the employee is no longer a "qualified individual with a disability."

In a recent book one author has suggested that under the ADA as it has been implemented by EEOC "an irrational urge to destroy the property of one's employer is legally protected under the ADA unless one insists on inflicting the damage by fire, which would bring it under the named exception."[131] This author is accurate in stating that pyromania is not a covered disability under the ADA. Otherwise, his hypothetical gives wrong information. EEOC explicitly states in its psychiatric guidance that an employer *does not* have to accommodate behavior in violation of standard conduct rules.[132]

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[124] Palmer v. Circuit Court of Cook County, 117 F.3d 351 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 893 (1998) (stating that the ADA only protects qualified employees and abusive, threatening employees are disqualified); Carozza v. Howard County, Md., 1995 U.S. App. LEXIS 387(4th Cir. 1995) (employee who engaged in insubordinate behavior such as insulting her supervisor and using obscenities was not able to perform the essential functions of her job); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227 (S.D.N.Y. 1994), *aff'd.* 60 F.3d 811 (2nd Cir. 1995) (stating that employers should be able to require their employees to not cause or contribute to disruptions or hostility in the workplace); Mazzaralla v. U.S. Postal Service, 849 F. Supp. 89, 94 (D. Mass. 1994) ("To qualify for employment of any nature, the employee must have the ability to refrain from willfully destroying his employer's property."); Adams v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989), *aff'd sub. nom.* Adams v. G.S.A., 1990 U.S. App. LEXIS 25878 (D.C. Cir. 1990)("One who is unable to refrain from doing physical violence to the person of a supervisor, no matter how unfair he believes the supervision to be or how provocative its manner, is simply not otherwise qualified for employment.").

[125] *See* 136 F.3d 1047 (5th Cir. 1998).

[126] *Id.* at 1052.

[127] *Id.*

[128] *Id.*

[129] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 29 [citation omitted].

[130] Ibid.

EEOC states that the only analysis required in situations involving employees who have become violent or destructive is whether the rule that has been broken is job related, consistent with business necessity, and uniformly applied. Since destruction of a supervisor's property is never consistent with business necessity, this employee can be fired regardless of what psychiatric disability he claims to have.

EEOC's former Chairman, Gilbert F. Casellas, reiterated these same facts about the psychiatric disabilities guidance and employee conduct in a letter to the editor of the *Atlanta Journal and Constitution*.[133] Responding to an editorial, Casellas stated that it "seriously misrepresents both the law and the guidance," merely contributing "to the unfounded beliefs that employers have about their obligations under the ADA."[134] Casellas observed that the editorial erroneously states that EEOC's guidance requires employers to tolerate poor judgment, chronic lateness, and hostility toward coworkers.[135] The editorial failed to note that the guidance, in fact, states that such traits are not in and of themselves impairments, so people who exhibit these traits are not necessarily individuals with disabilities protected by the ADA.[136] Moreover, even when such traits are linked to a mental illness, employers do not have an unqualified obligation to excuse them, because, according to the guidance, "an employer may discipline an employee with a psychiatric disability for violating conduct standards that are related to the employee's position and necessary for the employer's business, so long as the employer disciplines all employees who violate the rule in the same way."[137]

Direct Threat

The guidance's discussion on direct threat, like its previous discussions on other issues, derives from the ADA itself, EEOC's title I's regulations, or EEOC's interpretive guidance accompanying its title I regulations. The discussion cites EEOC interpretive guidance in stating that employers must apply the "direct threat" standard uniformly and may not use safety concerns to exclude employees with disabilities when persons without disabilities would not be excluded or removed under similar circumstances.[138] The discussion also reiterates the regulatory requirement that a "direct threat" must be "a significant risk of substantial harm to the health or safety of the individual or others that cannot be reduced or eliminated by reasonable accommodation."[139] Further, with respect to psychiatric disabilities, the employer must identify the specific behavior that would pose a direct threat.[140] An individual does not pose a direct threat simply by having a history of or being treated for a psychiatric disability.[141]

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[131] Walter K. Olson, *The Excuse Factory* (NY: Free Press, 1997), pp. 126–27.

[132] *See generally* EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 29–32. The guidance asks the hypothetical question: May an employer discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability? The answer provided is: Yes, provided that the workplace conduct standard is job-related and consistent with business necessity. [citation omitted] For example, nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. [citation omitted] Ibid., p. 29. Elsewhere the guidance provides a hypothetical fact pattern to illustrate the point further: "An employee has a hostile altercation with his supervisor and threatens the supervisor with physical harm. The employer immediately terminates the individual's employment, consistent with its policy of immediately terminating the employment of anyone who threatens a supervisor. . . . The employer also is not required to offer reasonable accommodation for the future because this individual is no longer a qualified individual with a disability. His employment was terminated under a uniformly applied conduct standard that is job-related for the position in question and consistent with business necessity." Ibid., p. 32 [citation omitted].

[133] *See* Gilbert F. Casellas, Chairman, EEOC, Letter to the Editor, *Atlanta Journal and Constitution*, Atlanta, Ga, re: EEOC's Enforcement Guidance on Psychiatric Disabilities, May 2, 1997, *reprinted in* 11 *Nat'l. Disability L. Rev.* (LRP) ¶ 172.

[134] Ibid., p. 766.

[135] Ibid.

[136] Ibid.

[137] Ibid.

[138] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 33 [ADA Manual, 70:1291] (citing 29 C.F.R. pt. 1630 app. § 1630.2(r) (1997)).

[139] Ibid.

[140] Ibid.

The guidance's discussion on direct threat addresses three issues. First, does an individual pose a direct threat in operating machinery solely because he or she takes medication that diminishes concentration or coordination as a side effect? The guidance answers no. It explains that whether such an individual poses a direct threat must be "determined on a case-by-case basis, based on a reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence."[142]

The second issue addressed in the section on direct threat is whether an employer can refuse to hire someone based on a history of violence or threats of violence.[143] The guidance explains that an employer may refuse to hire the individual if he or she would pose a direct threat. The employer must make this determination based on "an individualized assessment of the individual's present ability to safely perform the functions of the job."[144] In addition, the employer must identify the specific behavior of the individual with a psychiatric disability that would cause a direct threat. This includes "an assessment of the likelihood and imminence of future violence."[145]

Finally, the guidance addresses the question of whether an individual who has attempted suicide would pose a direct threat when he or she seeks to return to work. The guidance cites an example in which an employer fired an employee who had attempted suicide twice within a matter of weeks but who subsequently had returned to work and was performing his duties safely without reasonable accommodation.[146] The employer reviewed the doctor's and therapist's reports, which stated that the employee could perform all of his job functions safely. Nonetheless, the employer fired the employee without providing any contradictory medical or factual evidence to support this decision. The guidance states that "[w]ithout more evidence, this employer cannot support its determination that this individual poses a direct threat."[147]

Other Issues

Overall, the guidance provides a thorough and insightful discussion on the ADA and psychiatric disabilities. Unfortunately, the guidance has engendered strong feelings about the ADA and a questioning of just whose rights the law was designed to protect. One concern is that the guidance addresses mental impairments in a comprehensive way, but has never done so with severely limiting disabilities such as paraplegia. Another concern is that many people who suffer from no disability will be able to pretend that they have one, and psychiatric disorders and other "hidden disabilities" lend themselves far better to pretense than do obvious physical disabilities. Although plaintiffs in meritless cases are, for the most part, not prevailing, the publicity attached to these cases has been significant. EEOC cannot prevent attorneys from bringing such cases under the ADA, which they undoubtedly will continue to do.

With this particular policy guidance, EEOC appears to have exacerbated concerns that the statute's protections are being accorded to individuals whose rights to equal employment opportunity Congress did not intend of the ADA to protect. EEOC has sought, through a number of mechanisms, to ensure that the protections of the statute are accorded only to individuals with disabilities. However, as this guidance demonstrates, clearly defining the meaning of "disability" has proven an elusive goal.

Among the most important of the mechanisms EEOC relies on to enforce the law are the standards and criteria it has set forth in it regulatory and enforcement guidance for defining the meaning of "disability." These standards, which must be met before someone can claim a disability under the ADA, include an examination of the severity and potential for permanence of a given impairment to determine whether it is "substantially limiting on a major life activity."[148] This language may seem comprised largely of terms of art, but it has very important real world implications. EEOC investigators and attorneys begin their work on ADA cases by determining whether the alleged "disability" is within the ambit of the ADA.

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[141] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," p. 33 [ADA Manual, 70:1291].

[142] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 34 [ADA Manual, 70:1292]. It is somewhat contradictory for the guidance to *require* medical evidence to show the presence of a direct threat while stating that interviews with family and friends "may suffice" to provide credible evidence of disability.

[143] EEOC, "Enforcement Guidance on the ADA and Psychiatric Disabilities," pp. 34–35 [ADA Manual, 70:1292].

[144] Ibid.

[145] Ibid.

[146] Ibid.

[147] Ibid.

However, with this guidance, EEOC's interpretation of such key terms as "major life activity" and the significance it has attached to particular conditions such as personality disorders appear to be raising new concerns about how disability should be defined. In particular, the guidance suggests that disability is related not just to limitations created by physical or mental conditions but that behaviors and actions can be signs of disability as well.

Employer-provided Health Insurance, Disability, and Service Retirement Plan Coverage

In 1993 an EEOC official noted that of all ADA questions the agency receives, "far and away" the most requests had dealt with health insurance.[149] Part of the reason for the controversy relating to title I and insurance coverage is the conflicting goals of the statute as compared to the business needs of employers who provide insurance coverage. Thus, the applicability of title I of the ADA to employer-provided health insurance, disability, and service retirement plan coverage is affected by two very important but somewhat incompatible goals: the elimination of discrimination based on disability and the preservation of affordable employee health insurance plans.[150] To accomplish the first goal, Congress enacted the ADA to prohibit discrimination based on disability, a prohibition extended to employer-provided health insurance. To accomplish the second goal, insurers routinely differentiate between, and offer disparate levels of coverage for, particular health conditions as a means of keeping costs down.[151] Attempting to balance these interests, Congress created within the ADA a statutory exemption for certain distinctions in employer-provided benefit plans.[152]

In June 1993, EEOC issued interim guidance limited to an analysis of disability-based distinctions in employer-provided health insurance.[153] In May 1995, the agency issued a brief policy statement that addressed disability retirement and service retirement plans as they relate to title I of the ADA.[154] More recently, EEOC has reiterated its positions on both health insurance and disability and service retirement plan coverage in its litigation and informal advisory letters.[155] However, EEOC's position on disability-based distinctions in the context of health insurance differs markedly, particularly with regard to mental disabilities, from its position on the same distinctions in long term disability insurance.[156]

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[148] *See* 29 C.F.R. § 1630.2(j) (1997); EEOC, "Definition of the Term 'Disability'," § 902.4(a)(1)–(2).

[149] *See* First Anniversary of ADA's Job Provisions Brings Mix of Optimism, Workplace Concerns, 1993 Daily Labor Report (BNA) No. 141 at C–3 (July 26, 1993) (citing Naomi Levin, EEOC Senior Attorney Advisor).

[150] *See* 42 U.S.C. § 12201(c) (1994).

[151] *See* H. Miriam Farber, "Note, Subterfuge: Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the Americans with Disabilities Act?" *New York University Law Review*, vol. 69 (October/November 1994), pp. 850, 851–52. (hereafter cited as Farber, "Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the ADA?").

[152] 42 U.S.C. § 12201(c) (1994).

[153] EEOC, "Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-based Distinctions in Employer Provided Health Insurance" (EEOC Notice 915.002), June 8, 1993, p. 1 (hereafter cited as EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance").

[154] In May 1995, EEOC issued a brief guidance memorandum to EEOC field offices entitled "Questions and Answers About Disability and Service Retirement Plans Under ADA." In this memorandum, EEOC states that, generally, failure to offer a disability retirement plan or offering a disability retirement plan that provides lower levels of benefits than the employer's service retirement plan are not violations of the ADA. However, plans that offer different benefits for individuals with disabilities than for other employees would violate the ADA. For example, if an individual with a disability is eligible for both service retirement plan and a disability retirement plan but is required to take the less advantageous disability retirement plan, the employer would be in violation of the ADA. EEOC, "Questions and Answers About Disability and Service Retirement Plans Under the ADA," May 11, 1995, pp. 2–3 (hereafter cited as EEOC, "Questions and Answers About Retirement").

[155] *See, e.g.*, EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir. 1996); Peggy Mastroianni, Associate Legal Counsel, EEOC, letter to David M. Ellis, Esq., Clark, West, Keller, Butler, & Ellis, L.L.P., Dallas TX, re: limitations on medical insurance coverage for a particular employee's hemophiliac dependents, Apr. 10, 1997 *reprinted in* 11 *Nat'l. Disability Law Review* ¶ 327 (hereafter cited as Mastroianni letter).

[156] See discussion below on EEOC's litigation and *amicus* positions in cases relating to long term disability insurance.

Disability rights advocates, employers, various commentators, and the courts have criticized the ADA's statutory provision on health insurance coverage and the EEOC policy guidance based on it. Among the criticisms are that the provision is too vague and ambiguous.[157] At least one critic says the guidance's discussion of disability-based distinctions relating to mental and physical illnesses is contrary to the plain language of the statute.[158] Another aspect of the guidance that has been criticized as both unclear and inconsistent with the ADA is the discussion on the role of actuarial data.[159]

In addition, soon after EEOC issued the guidance on health insurance, employers' groups expressed fears that its provisions were unclear and thus would be difficult to follow. Upon EEOC's release of the interim enforcement guidance, employers began expressing concerns that its requirements placed too great a burden on businesses. One national advocacy organization for small businesses stated that the guidance was "premature" and that small employers would have difficulty trying to follow its provisions.[160] More recently, another nationwide association of employers has stated that "EEOC's major policy challenge is to avoid expanding the ADA beyond its statutory parameters . . . Title I of the ADA . . . quite properly does not affect the internal provisions of employee benefit plans, such as benefit levels, nor does it mandate such benefits."[161] According to a study by the Employee Benefits Research Institute (EBRI), these opinions are shared by many employers. Based on data from the March 1997 Current Population Survey, the study identifies increases in insurance costs and government regulation of employer-provided benefits as the top concerns of employers in the United States.[162] EEOC's Associate Legal Counsel stated with regard to these statistics: "the same arguments were made when Congress was considering enacting the Pregnancy Discrimination Act which required coverage of pregnancy in employer provided health-insurance plans. A similar reaction occurred when the EEOC and the courts took the position that retirement plans that provide lower periodic payments to women than to men (based on women's greater longevity) violate Title VII. Neither health insurance plans nor retirement plans were made unaffordable by these changes, as had been predicted."[163]

June 1993 Interim Enforcement Guidance

In 1993, EEOC published interim guidance on disability-based distinctions in employer-provided health insurance to assist its investigators in processing allegations of disability discrimination relating to health insurance coverage. This enforcement guidance emphasized that

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[157] Farber, "Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the ADA?" p. 863. *See also* Gwen Thayer Handelman, *Health Benefit Plans and the Americans with Disabilities Act* (Horesham, PA: LRP Publications, 1993), p. 21; Christopher Aaron Jones, "Legislative 'Subterfuge'?: Failing to Insure Persons with Mental Illness Under the Mental Health Parity Act and the Americans with Disabilities Act," *Vanderbilt Law Review*, vol. 50 (April 1997), pp. 775–81.

[158] *See* Mary T. Giliberti, "The Application of the ADA to Distinctions Based on Mental Disability in Employer-Provided Health and Long-term Disability Insurance Plans," *Mental and Physical Disability Law Reporter*, vol. 18, no. 5 (Sept.-Oct. 1994), p. 603. *See generally* Mary T. Giliberti, Staff Attorney, Bazelon Center for Mental Health Law, letter to the EEOC, re: the Interim Enforcement Guidance on the application of the Americans with Disabilities Act of 1990 to disability-based distinctions in employer provided health insurance, Jan. 28, 1994 (hereafter cited as Giliberti letter).

[159] *See* John Lancaster, Executive Director, President's Committee on Employment of People with Disabilities, interview in Washington, DC, Oct. 14, 1997, p. 3 (hereafter cited as Lancaster interview).

[160] *See* First Anniversary of ADA's Job Provisions Brings Mix of Optimism, Workplace Concerns, 1993 *Daily Labor Report* (BNA), No. 141, p. C–3 (July 26, 1993) (citing Caroline Stinebower, legislative representative for the National Federation of Independent Business). *See also* Kathlynn L. Butler, "Securing Employee Health Benefits Through ERISA and the ADA," *Emory Law Journal* vol. 42 (Fall 1993), pp. 1197, 1238, n. 254 ("Another concern that has been expressed about the EEOC Guidelines is that the EEOC has given an enormously complicated set of legal obligations to businesses.") (citing "Insuring the Disabled," *Sacramento Bee*, June 21, 1993, at B14).

[161] Ann Elizabeth Reesman, General Counsel, Equal Employment Advisory Council, letter to Frederick D. Isler, OCRE, USCCR, Mar. 2, 1998, p. 4.

[162] Employee Benefits Research Institute, Press Release, "EBRI Releases Latest Health Insurance Stats: Employment-Based Health Insurance Rises for Third Consecutive Year," Nov. 7, 1997, http://www.ebri.org/prrel/pr399.htm. "EBRI is a private, nonprofit, nonpartisan public policy research organization based in Washington, DC. Founded in 1978, its mission is to contribute to, to encourage, and to enhance the development of sound employee benefit programs and sound public policy through objective research and education." Ibid.

[163] *See* EEOC Comments, p. 14.

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employees with disabilities must have access to the same health insurance provided to other employees and that an employer may not make employment decisions based on concerns about the effect a person with a disability might have on the employer's health plan.[164] The guidance lists relevant legislation, outlines the legal framework investigators should use to analyze charges relating to disability-based distinctions in health insurance, provides examples of disability-based distinctions, and explains the burden of proof employers and/or insurers must meet to defend challenged health insurance terms or provisions.[165]

Statutory and Regulatory Authority

The interim enforcement guidance provides the statutory and regulatory bases for ADA applicability to health insurance plans.[166] Title I of the ADA prohibits an employer from discriminating against a qualified individual with a disability in all aspects of employment,[167] and regulations subsequently issued by EEOC to implement the ADA state that this provision extends to "fringe benefit" programs offered by employers.[168] Fringe benefits include life insurance, disability insurance, and pension plans, but the interim enforcement guidance only applies to health insurance plans.[169]

The guidance notes that statutory and regulatory provisions also establish employer liability for discrimination against job applicants or employees resulting from any contractual relationship with an insurance company or other organization to provide employee health insurance.[170] In addition, the guidance cites legislative history that shows congressional intent to apply to employer health insurance[171] a bar on limiting, segregating, or classifying any employee in an adverse way based on disability.[172]

The guidance distinguishes between insured and self-insured plans and states that the protections of the ADA apply to both. Insured health insurance plans are provided by a separate insurance entity and purchased by employers. They are regulated by the Employment Retirement Income Security Act of 1974 (ERISA)[173] and State law. Self-insured plans, in contrast, are those in which an employer assumes the liability of an insurer. These plans are regulated by ERISA.[174]

One final, significant point is relegated to a footnote, where the guidance explains that use of the term "discriminates" refers only to disparate treatment, since the "adverse impact theory of discrimination is unavailable in this context."[175] The guidance does not explain why disparate impact analysis may not be used to evaluate health insurance discrimination charges, but refers to *Alexander v. Choate*,[176] a Supreme

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[164] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance"); EEOC, *FY 1993 Annual Report*, p. 12.

[165] *See generally* EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance."

[166] Ibid., p. 2.

[167] *See* 42 U.S.C. § 12112(a) (1994) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.")

[168] *See* 29 C.F.R. § 1630.4(f) (1997) ("It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to. . .(f) [f]ringe benefits available by virtue of employment, whether or not administered by the covered entity.")

[169] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 2. In May 1995, EEOC issued a separate "Questions and Answers" policy guidance memorandum on the ADA and disability retirement and service retirement plans.

[170] *See* 42 U.S.C. § 12112 (b) (2) (1994);29 C.F.R. § 1630.6 (a) and (b) (1997) (discussed, pp. 2–3 of the Interim Guidance).

[171] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 3 (citing S. Rep. No. 101–116, 101st Cong., (1989) at 28, 29 ; H.R. Rep. No. 485 part 2, 101st Cong., 2nd Sess. (House Labor Report) (1990), at 58–59 *reprinted in* 1990 U.S.C.C.A.N. ____ ; H.R. Rep. No. 485 part 3, 101st Cong., 2nd Sess. (House Judiciary Report) (1990) at 36 *reprinted in* 1990 U.S.C.C.A.N. _____; and 29 C.F.R. pt. 1630 app. § 1630.5 (1997)).

[172] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 3 (citing 42 U.S.C § 12112(b) (1) and 29 C.F.R. § 1630.5 (1997)).

[173] 29 U.S.C. §§ 1001–1461 (1994).

[174] *See generally id.*; EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 4.

[175] Ibid., p. 5, n. 7.

[176] 469 U.S. 287 (1985) (assuming without deciding that § 504 of the Rehabilitation Act reaches at least some conduct

Court case involving section 504 of the Rehabilitation Act of 1973, and ADA legislative history discussing the case.[177] The ADA is in large part modeled after the Rehabilitation Act. However, the ADA, through sections 102 and 103, indicates that disparate impact analysis may be used, whereas the Rehabilitation Act does not include a comparable express provision.[178] Title I of the ADA permits disparate impact analysis.[179] However, title V of the ADA indicates that disparate impact is not available as a means of evaluating whether impermissible discrimination exists in the health insurance context.[180]

Disability-Based Distinctions in Employer-provided Health Insurance

Framework of Analysis

The interim enforcement guidance defines a disability-based distinction as one of the following: "A term or provision that . . . singles out a particular disability (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., non-coverage of all conditions that substantially limit a major life activity)."[181]

The guidance states that if EEOC determines that a challenged health insurance plan or provision includes a disability-based distinction, the insurance plan may be lawful under the ADA if it falls within the ambit of section 501(c) of the ADA.[182] This section provides that both insured and self-insured[183] plans that are "bona fide," or based on "underwriting risks, classifying risks, or administering such risks," are lawful as long as they are not based on "subterfuge" to evade the purposes of the ADA.[184] The guidance notes that EEOC has incorporated the no-subterfuge and bona-fide requirements in its title I regulations.[185] The guidance states that when EEOC determines that the challenged provision is a disability-based distinction, the respondent in the ADA claim must show that the health insurance plan is a bona fide plan and the disability-based distinction is not being used as a subterfuge.[186]

What Is a Disability-based Distinction?

The interim guidance states that not all distinctions based on health conditions are to be considered disability-based distinctions under the ADA:[187] "[I]nsurance distinctions that are not based on disability, and that are applied equally to all insured employees, do not discriminate on the basis of disability and so do not violate the ADA."[188] For instance, provisions containing distinctions that are not related to a *particular* disability and that apply equally to *all* insured employees are not deemed disability-based distinctions.[189] The guidance provides examples of health insurance plan provisions that

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that has an unjustifiable disparate impact upon persons with disabilities).

[177] H.R. Rep. No. 485 part 2, 101st Cong., 2nd Sess. (House Labor Report) (1990) at 137 *reprinted in* 1990 U.S.C.C.A.N. 1990, _____.

[178] *See* 42 U.S.C. §§ 12112(b), 12113(a) (1994); 29 U.S.C. §§ 701–797 (1994). *But see* Alexander v. Choate, 469 U.S. 297 (1985).

[179] *See id.* § 12112(b) (1)–(3).

[180] *See id.* § 12201(c) (1994).

[181] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 7.

[182] 42 U.S.C. § 12201(c) (1994).

[183] The distinction is that insured health insurance plans are purchased from an insurance company or other organization such as a health maintenance organization (HMO), whereas with a self-insured plan, the employer assumes the direct liability of an insurer.

[184] 42 U.S.C. § 12201(C0 (1994). *See also* EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 4.

[185] *See* 29 C.F.R. § 1630.16(f) (1997) which states: "Health insurance, life insurance, and other benefit plans—

"(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

"(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

"(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

"(4) The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part."

[186] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 5.

[187] Ibid.

[188] Ibid.

[189] Ibid. (emphasis added).

fall under this rubric. These include distinctions made between benefits allowed for physical as compared to "mental/nervous" disabilities; limits on or exclusions of coverage for experimental or elective medical procedures; limits on or exclusions of procedures that are "not exclusively, or nearly exclusively utilized for the treatment of a particular disability"; and exclusions based on blanket preexisting condition clauses.[190]

The distinction between physical and mental disabilities has been a major topic of controversy relating to this guidance and EEOC's later policy statement on disability insurance and retirement service plans. Specifically at issue is whether the ADA prohibits employers from providing employees health insurance that offers lower coverage or benefits for mental health impairments than for physical disorders. The interim guidance takes the position that it is lawful under the ADA for employer-provided health insurance plans to provide different services for physical as compared to mental conditions.[191]

According to the interim enforcement guidance, employers may lawfully offer health insurance plans that provide different benefits (amounts of coverage) for mental as compared to physical conditions, because such a difference is not a "disability-based" distinction.[192] The guidance argues that a term or provision is "disability based" if it singles out a *particular* disability (e.g., deafness, AIDS, schizophrenia) or a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases). Although it could be credibly argued that mental disabilities *are* a discrete group of disabilities, nonetheless, the guidance concludes that they are not. In addition, the guidance characterizes differences between physical and mental disabilities as "broad distinctions" that apply to "a multitude of dissimilar conditions" and "constrain individuals both with and without disabilities."[193] Based on these conclusions, the guidance determines that while differences between physical and mental disabilities "may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate the ADA."[194]

As legal authority supporting this position, the guidance cites cases in which courts found that such plans did not violate the Rehabilitation Act of 1973. For example, in *Doe v. Colautti*,[195] the Third Circuit held that the Rehabilitation Act did not require Pennsylvania's medical assistance statute to provide parity of benefits for inpatient treatment of mental and physical illnesses.[196] One disability rights advocacy group has criticized EEOC's reliance on these cases, indicating that although the ADA was modeled in large part after the Rehabilitation Act, unlike the Rehabilitation Act, the ADA contains language specifically addressing insurance issues.[197]

Other mental health-related laws arguably favoring the guidance's position on this issue are Congress' actions relating to mental health insurance policy. For example, some argue that the many limitations Congress placed on its Mental Health Parity Act (MHPA) of 1996[198] shows that Congress did not intend the ADA to establish parity between mental and physical impairments in health insurance plans.[199] The

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[190] Ibid., pp. 6–7.

[191] Ibid. p. 6.

[192] Ibid. The guidance notes that the term "discriminates" in this context refers only to disparate treatment. The disparate impact theory of discrimination is not available in the context of employer-provided health insurance based on the U.S. Supreme Court's ruling in Alexander v. Choate, 469 U.S. 287 (1985). EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 5, n.7.

[193] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 6.

[194] Ibid.

[195] 592 F. 2d 704 (3rd Cir. 1979).

[196] *See id.* at 710–12 (holding that the Rehabilitation Act did not require Pennsylvania's medical assistance statute to provide parity of benefits for inpatient treatment of mental and physical illnesses); Doe v. Devine, 545 F. Supp. 576 (D.D.C. 1982), *aff'd on other grounds*, 703 F.2d 1319 (D.C. Cir. 1983) (holding that Blue Cross reduction of mental health benefits did not discriminate based on disability).

[197] *See* Giliberti letter.

[198] Pub. L. No. 104–204, §§ 701–703, 110 Stat. 2874, 2944–2950 (codified at 29 U.S.C. § 1185a (1998)).

[199] *See* EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1044 (7th Cir. 1996) (citing congressional debate over the MHPA and its requirement of parity of coverage for mental and physical conditions as "reinforc[ing the court's] conclusion based on the language of the ADA that the issue of parity among physical and mental health benefits is one that is still in the legislative arena.").

MHPA requires that health insurance plans offering mental health benefits not place lower annual or lifetime caps on such benefits than they do on medical or surgical benefits.[200] It does not require insurance plans to provide mental health benefits,[201] or apply to employers with fewer than 51 employees; and insurance plans that experience a 1 percent or more increase in costs may also claim an exemption.[202] Employers also may continue to impose more limits on mental health benefits than medical or surgical benefits, through practices such as higher coinsurance rates.[203]

Despite the weight of legal authority, congressional limitations on parity for mental health insurance in the MHPA, and the accord of the insurance industry and employers in general, EEOC's position on this issue has been criticized heavily by scholars and disability rights advocates as inconsistent with the plain language and the legislative history of the ADA. In the words of one commentator, "Mental illness should be treated as other disabilities under the ADA -- persons with mental illness should receive services commensurate with other disabilities, including the right to equal insurance coverage."[204] One mental health disability rights advocacy group argues that EEOC's position that limiting benefits for mental disorders does not constitute a disability-based distinction contravenes common sense and logic as well as the law.[205] Another argument advanced by a critic of EEOC's position on this issue is that the guidance is inconsistent in defining certain types of disability-based distinctions. In particular, this commentator notes that the guidance declares that limits on benefits for mental health care or eye care do not constitute disability-based distinctions, while limits on benefits for cancer treatment would represent a disability-based distinction. Since limits on mental health care, eye care, and cancer care all are defined in terms of health, rather than time or place, the author argues that all three limits should be defined in the same manner.[206]

Although not widely discussed, another troublesome problem arises from the guidance's express provision that lower benefit caps for mental disorders than physical disorders do not violate the ADA. In some cases this distinction has required additional litigation solely to determine whether a particular impairment is mental or physical under the ADA. According to one disability rights advocacy group, families of children with organic brain syndrome have sought court determinations as to whether the syndrome is a mental or physical impairment because of the markedly different levels of benefits their insurers provide for mental and physical health conditions.[207]

Employer/Insurer Defenses and Burden of Proof

The interim enforcement guidance first directs an investigator to determine if the health insurance provision in question constitutes a disability-based distinction. If it does not, the inquiry ends at this point. If it does, it then becomes the employer's responsibility to prove that the term falls within the protective ambit of section 501(c) of the ADA. Developed by Congress in response to insurance industry concerns that compliance with ADA requirements would cause business costs to skyrocket, section 501(c) places limits on the act's applicability to health insurance. Sometimes referred to as the "safe harbor" provision, section 501(c) provides:

> (c) Insurance. —Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

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[200] 29 U.S.C. § 1185a (1998).

[201] *See id.* at § 1185a(b)

[202] *Id.* at § 1185a(c).

[203] *See id.* at § 1185a(b).

[204] Noe, "Discrimination Against Individuals with Mental Illness," p. 21.

[205] Bazelon Center for Mental Health Law, e-mail response to request for information, Feb. 26, 1998.

[206] *See generally*, Farber, "Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the ADA?," pp. 905–06.

[207] Giliberti letter, p. 3.

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
Paragraphs (1), (2) and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.[208]

Essentially, if the EEOC investigator finds that a particular health insurance provision represents a disability-based distinction, the provision will fall under the protective scope of section 501(c) if the employer or insurer proves two elements. First, the employer must show that the health insurance plan in question is "bona fide" and consistent with applicable State law. Second, the employer must prove that it has not used the challenged provision as "subterfuge."[209] If the employer shows that its insurance plan is bona fide and the disability-based distinction does not represent subterfuge to avoid compliance with the ADA, the provision or term does not violate the ADA. In contrast, if the employer is unable to meet either of these two requirements, the investigator must find the health insurance provision, and therefore the employer and/or insurer, in violation of the ADA.

According to the interim guidance, the proper inquiry to determine whether a particular health insurance plan is bona fide involves simply proving that the plan, insured or self-insured, exists, pays benefits, and its terms have been clearly communicated to eligible employees.[210] To define the term "subterfuge," the interim guidance states only that it "refers to disability-based disparate treatment that is not justified by the risks or costs associated with the disability. Whether a particular challenged disability-based insurance distinction is being used as a subterfuge will be determined on a case by case basis, considering the totality of the circumstances."[211] EEOC has stated in a more recent informal advisory letter that:

> employers and insurers may continue to use legitimate risk assessment and other traditional insurance classification and administrative practices even if they have an adverse effect on individuals with disabilities, as long as the practices are uniformly applied to all insured employees and are not used as a "subterfuge."[212]

The U.S. Supreme Court has established a definition of subterfuge in two cases involving the Age Discrimination in Employment Act (ADEA), which contains an exemption for employee benefit provisions similar to section 501(c) of the ADA. In *United Air Lines, Inc. v. McMann*,[213] the Supreme Court adopted a standard and straightforward definition of subterfuge as a "scheme, plan, stratagem, or artifice of evasion."[214] Twelve years later, the Supreme Court affirmed this definition in *Public Employees Retirement System of Ohio v. Betts*.[215] In addition, in *Betts* the Supreme Court rejected an EEOC interpretive regulation that defined subterfuge as a plan or provision that lacks a cost justification and held instead that a plan or provision does not constitute subterfuge unless the employer intended to discriminate.[216]

The guidance acknowledges the existence of the *Betts* definition. In *Betts*, the Court was interpreting the Age Discrimination in Employment Act. The guidance observes that "the Court held that a pre-ADEA benefit plan could not be a subterfuge, and that, since the ADEA did not expressly apply to fringe benefits, subterfuge required a showing of the employer's specific intent to discriminate in some non-fringe aspect of the relationship."[217] However, the guidance states that the language and legislative history of the ADA indicate Congress did not intend to apply the *Betts* definition of subterfuge in ADA cases.[218] The guidance notes that the language of the ADA expressly covering "fringe benefits" and the act's rejection of the concept of a "safe harbor" for pre-ADA plans mean that it was plain congressional intent not to rely on the *Betts* approach with the ADA.[219]

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[208] 42 U.S.C. § 12201(c) (1994).

[209] The terms "bona fide" and "subterfuge" are found in section 501(c) of the ADA. *Id.* Many of the uncertainties employers and insurers face in designing ADA-compliant health insurance plans stem from section 501(c) and its use of terms such as "bona fide" and "subterfuge."

[210] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," pp. 10–11. Note, however, that to gain the protection of § 501(c), an insured plan must also meet the additional requirement of not being "inconsistent with applicable state law as interpreted by the appropriate state authorities." p. 10.

[211] Ibid., p. 11.

[212] Mastroianni letter.

[213] 434 U.S. 192 (1977).

[214] *Id.* at 203.

[215] 492 U.S. 158 (1989).

[216] 492 U.S. 158, 171–81.

[217] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 9, n.10.

Nevertheless, some courts have not followed the EEOC guidance's definition of subterfuge, but rather have followed the Supreme Court's definition set forth in *Betts*. For example, in *Modderno v. King*,[220] the DC Circuit adopted the definition of subterfuge contained in the two Supreme Court ADEA cases, rather than EEOC's definition in the interim enforcement guidance.[221] Although *Modderno* involved a claim under the Rehabilitation Act of 1973, the court specifically contemplated the term subterfuge as defined in the ADA, since Congress amended the Rehabilitation Act in 1992 to incorporate the ADA's definition of subterfuge.[222] In *Krauel v. Iowa Methodist Medical Center*, the U.S. Court of Appeals for the Eighth Circuit also expressly rejected the EEOC guidance definition of subterfuge and instead followed the *Betts* definition.[223]

The guidance contains several examples of ways an employer can prove that a given disability-based insurance term or provision is not being used as subterfuge.[224] For instance, an employer may show that the disability-based provision in question does not cause disparate treatment of employees.[225] Alternatively, an employer may concede that the term or provision causes disparate treatment, but show that it is justified by "legitimate actuarial data."[226]

With respect to the uses of actuarial data, the guidance states that the respondent may prove its actions are permissible because they are based on increased risk and thus increased cost to the health insurance plan of the disability, and not on the disability *per se*.[227] The guidance describes "legitimate risk classification and underwriting procedures" as the basis for legitimate actuarial data. It states that "risk classification" refers to "the identification of risk factors and the grouping of those factors that pose similar risks. Risk factors may include characteristics such as age, occupation, personal habits (e.g., smoking), and medical history."[228] The term "underwriting procedures" refers to "the application of the various risk factors or risk classes to a particular individual or group (usually only if the group is small) for the purpose of determining whether to provide insurance."[229]

EEOC's policy position on actuarial data and its uses has been the subject of debate. Some commentators contend that specific aspects of the interim enforcement guidance relating to actuarial data are inconsistent with the express statutory language of the ADA. For example, a disability rights advocacy group claims that the guidance fails to define what types of information courts are to consider as "legitimate" actuarial data. This same group also points out that the guidance does not require employers or insurers to provide such actuarial data to employees who are refused insurance coverage and calls upon the EEOC to mandate that employers/insurers make such information available.[230] Similar comments were made by other disability advocates at a national conference held in fall 1997. They stressed the need for individuals with disabilities to have access to the actuarial data on which employers or insurance companies rely in limiting their coverage.[231] Along similar lines, the Executive Director of the President's Committee on Employment of People with Disabilities has called for EEOC to evaluate the quality of the actuarial data used by insurance companies.[232] Further, one author has raised concerns that the interim guidance deviates significantly from the statutory language of the ADA because of its "undue reliance" on actuarial standards to define subterfuge.[233] According to this author, the plain language of section 501(c) and the legislative history indicate that actuarial principles are only to be considered in "determining whether insured plans are consistent with state law" and "do not apply to self-insured plans subject to ERISA..."[234]

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[218] Ibid., p. 9.

[219] Ibid., p. 9, n. 10. Some courts have rejected the *Betts* definition of subterfuge in the context of the ADA. See Lewis v. Aetna Life Ins. Co., 950 F.Supp. 422, 430–31 (D.N.H. 1996). Other courts in addressing the safe harbor provision in ADA insurance cases, implicitly reject the *Betts* definition of subterfuge. *See* Doe v. Mutual of Omaha Ins. Co., 1998 U.S.Dist. LEXIS 4894 (N.D. Ill. 1998); Chabner v. United of Omaha Life Ins. Co., 994 F.Supp. 1185 (N.D.Cal. 1998); Schroeder v. Connecticut General Life Ins. Co., 1994 U.S. Dist. LEXIS 21298 (D. Colo. 1994).

[220] 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 772 (1997).

[221] *Id.* at 1065.

[222] *See id.* at 1064.

[223] 95 F.3d 674, 678–79 (8th Cir. 1996).

[224] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," pp. 11–13. The guidance states that these examples do not constitute an exclusive list.

[225] Ibid., p. 11. The guidance provides the following example of this justification: "[W]here a charging party has alleged that a benefit cap of a particular catastrophic disability is discriminatory, the respondent may prove that its health insurance plan actually treats all similarly catastrophic conditions in the same way." Ibid.

[226] Ibid., p. 12.

[227] Ibid., pp. 11–12.

[228] Ibid., p. 12, n. 15.

[229] Ibid.

[230] *See* Giliberti letter.

In court, the role of actuarial data was considered in *Baker v. Hartford Life Insurance Company*.[235] The defendant company, Hartford Life, argued that its refusal to provide health insurance to an individual with a seizure disorder did not violate the ADA, because the ADA contains an exemption for insurance decisions based on risk classification. The court, however, ruled that insurers seeking exemption under section 501(c)(3) must show some evidence to prove that their decision to deny coverage was based on sound actuarial data.[236] Thus, the court did not accept at face value the insurer's assertions that denials of coverage were based on actuarial data. Similarly, in *World Insurance Co. v. Branch*,[237] the court held that a health insurance policy providing a lower benefit cap for AIDS than for other catastrophic illnesses violated the ADA when the insurer did not show that the disparate benefits were based on actuarial evidence, reasonably anticipated experience, or bona fide risk classification.[238]

An employer also may show that disparate treatment is needed to preserve the financial solvency of the insurer.[239] In this situation, an employer would have to prove that it limited coverage for a particular disability (or group of disabilities) because providing more coverage would bankrupt the insurer. Similarly, the employer could argue that a disability-based distinction is necessary to prevent an unacceptable increase in premiums or decrease in coverage of its health insurance plan. According to the guidance:

> An unacceptable change is a drastic increase in premium payments. . .or a drastic alteration to the scope of coverage of level of benefits provided, that would: 1) make the health insurance plan effectively unavailable to a significant number of other employees, 2) make the health insurance plan so unattractive [that only individuals with high health risks who could not find affordable insurance elsewhere would remain in the plan], or 3) make the health insurance plan so unattractive that the employer cannot compete in recruiting and maintaining qualified workers due to the superiority of health insurance plans offered by other employers in the community.[240]

A final potential justification offered by the guidance applies to situations where an insurer has denied an employee coverage for a disability-specific treatment. In these instances, an insurer may show that the treatment in question does not have any medical value and hence provides no benefit to employees. EEOC would require insurers relying on such justification to prove the assertion by "reliable scientific evidence."[241]

The interim guidance states that there is no "safe harbor" for disability-based distinctions in insurance plans established before enactment of the ADA. "[T]he challenged disability-based terms and provisions of a pre-ADA health insurance plan will be scrutinized under the same subterfuge standard as are the challenged disability-based terms, provisions, and conditions of post-ADA health insurance plans."[242]

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[231] Mary Lou Breslin and Arlene Mayerson, Disability Rights Education and Defense Fund, remarks at "Employment Post the Americans with Disabilities Act," conference in Washington, DC, Nov. 17–18, 1997, pp. 8, 27.

[232] Lancaster interview, p. 3.

[233] Farber, "Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the ADA?," pp. 904, 906–07.

[234] Ibid., p. 907.

[235] 1995 U.S. Dist. LEXIS 14103 (N.D. Ill. 1995).

[236] *Id.* at *9–*10. Courts have emphasized the need for actuarial evidence to justify disparity or denial of benefits in several other cases. *See* Doukas v. Metro. Life Ins. Co., 950 F. Supp. 422, 429 (D.N.H. 1996) (finding that the insurance practice must be based on actuarial data or on the company's experience relating to the risk involved); Anderson v. Gus Mayer Boston Store of Del., 924 F. Supp. 763, 780–81 (E.D. Tex. 1996); Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299, 305 (N.D. Cal. 1997); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1169 (E.D. Va. 1997).

[237] 966 F. Supp. 1203 (N.D. Ga. 1997).

[238] *Id.* at 1209.

[239] EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," p. 12.

[240] Ibid., pp. 12–13.

[241] Ibid., p. 13.

EEOC's Litigation and *Amicus* Positions on Long Term Disability

EEOC's Associate Legal Counsel has stated that, according to the analysis EEOC endorsed in its health insurance policy guidance, singling out the mental/nervous category in the context of health insurance does not indicate a disability-based distinction.[243] This is because, in the health insurance context, the mental/nervous category encompasses both people with disabilities and those without, and a wide variety of dissimilar conditions.[244] This means that both people with schizophrenia and people who *have no disability* but go to a psychiatrist to improve their lives fall into this category. The Associate Legal Counsel further noted that this remains EEOC's position until it is changed.[245]

However, she said, when the same analysis is applied in the context of long term disability benefits or retirement plans, many things are different. In particular, the long term disability context deals only with people with disabilities. Therefore, any mental/physical distinction must single out particular disabilities, thereby making it disability based and thus potentially impermissible under the ADA if it cannot be justified.[246]

Physical Versus Mental Disabilities

The issue of whether or not disability-based distinctions between mental and physical disabilities in long term disability and retirement coverage plans are lawful under the ADA may have a significant effect on employer practices. EEOC has taken the position that such distinctions discriminate on the basis of disability and therefore are unlawful under the ADA.[247]

In *Leonard F. and EEOC v. Israel Discount Bank of New York*, the plaintiff was given 2 years of long term disability by Met Life because he could no longer work due to depression, but employees under the plan with physical disabilities had long term coverage until they reached age 65.[248] The parties reached an agreement in which the defendant bank agreed to establish a policy of providing the same level of benefits in long term disability insurance coverage.[249] The case is significant because, as the plaintiff's attorney in the case stated: "It sends the message to employers and insurance companies that the manner in which they treat psychiatric disabilities has to be on a par with how they treat physical disabilities."[250] For EEOC, the resolution of the case was a major success because it helped make the public aware of the agency's position that the ADA requires employers to provide the same benefits under long term disability insurance policies to individuals with mental conditions as are provided to persons with physical conditions. To the extent this position is adopted by other employers, it will benefit a significant number of disabled former employees nationwide.[251] The settlement in *Leonard F.* reflects the direction in which EEOC would like to take the law.

However, other organizations disagree with EEOC's position. For example, the American Council of Life Insurance has defended the practice of distinguishing between physical and mental conditions,[252] arguing that mental conditions are extremely difficult to define, much less diagnose. As a result, if there were no caps on such conditions, insured members could take advantage of the coverage and overuse the benefits. In addition, the cost of providing equal benefits would raise the cost of insurance for everyone.[253]

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[242] Ibid., pp. 8–9.

[243] *See* Mastroianni interview, p. 7.

[244] *See* EEOC, "Interim Enforcement Guidance on the Application of the ADA to Disability-based Distinctions in Employer Provided Health Insurance," pp. 5–9.

[245] *See* Mastroianni interview, p. 7.

[246] Ibid.

[247] *See, e.g.*, EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir. 1996).

[248] 967 F. Supp. 802, 803–05 (S.D.N.Y. 1997). Plaintiff originally brought his claim against the bank employer under title I of the ADA, but was allowed to amend the complaint over the objection of the defendants both to bring the claim under title III and add Met Life as a party defendant. Because the court held that the purpose of title III of the ADA was not to regulate employment actions and that Met Life's policy was consistent with State insurance law, the defendant's motion to dismiss was granted on the issue of the plaintiff's claim under title III. *Id.* at 805–06.

[249] *See* "Settlement: New York Bank to Provide Parity Benefits for Mental, Physical Conditions," *National Disability Law Reporter Highlights*, vol. 11, iss. 6, Mar. 12, 1998, p. 1 (hereafter cited as "Settlement . . ." *NDLR Highlights*).

[250] Ibid.

[251] Gerald Letwin, Assistant General Counsel, Systemic Litigation Services, Office of General Counsel, EEOC, interview in Washington, DC, April 6, 1998, p. 2 (hereafter cited as Letwin interview).

[252] "Settlement. . ." *NDLR Highlights*, p. 5.

Other cases involving this issue have reached different results. In *Brewster v. Cooley Associates/Counseling and Consulting Services, Ltd.*,[254] a Federal district court in New Mexico found that the ADA does not prohibit an employer from providing greater long term disability benefits for a physical disorder than for a mental one.[255] The *Brewster* court cited precedent in finding that "offering all employees the same benefits, although the benefits provide for different kinds of coverage, is not a discriminatory act that will support a cause of action under title I of the ADA."[256] In *Parker v. Metropolitan Life Insurance Company*, the court observed that "the ADA does not mandate equality between individuals with different disabilities."[257]

However, in *Lewis v. Aetna*,[258] a recent decision in Virginia, a Federal district court judge has ruled that Kmart Corporation cannot give lower long term disability benefits to a store manager because he has clinical depression rather than for a physical disorder. The court observed that the ADA's legislative history, requiring "that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience," makes clear Congress' intent with respect to permissible insurance practices under the ADA.[259] The court found that Kmart did not offer actuarial justification for the differing coverage of mental and physical conditions.[260]

In examining whether Kmart's insurance plan violated the ADA, the court noted that the ADA provision on insurance favors "unnecessary disruption of state insurance regulation" and therefore concluded that "the consistency of a challenged disability plan is best examined within the context of the state where the disabled person lives, is employed, and receives his insurance benefits."[261] In this case, the State of Virginia was the applicable forum. The court applied § 38.2-508 of the Virginia Code, which states:

> No person shall refuse to insure, refuse to continue to insure, or limit the amount, extent or kind of insurance coverage available to an individual . . .solely because of . . . mental or physical impairments, unless the refusal, limitation or rate differential is based on sound actuarial principles.[262]

Based on this language, the court found that Kmart had to ensure "that its decision to offer an insurance plan limiting disability coverage for those with mental disabilities was based on sound actuarial principles for the decision to be protected" under the ADA.[263] The court ruled that Kmart had not met this burden, citing Kmart's own acknowledgment that "There is no need for us to talk about cost actuarial. That's an alternative defense which Kmart did not seek to rely upon in this case."[264] Accordingly, the court found in favor of the plaintiff.[265]

In *Leonard F.*, as with other long term disability insurance cases dealing with the issue of mental health benefits parity, EEOC has litigated on behalf of the plaintiffs despite its position against requiring mental health parity in its 1993 Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-provided Health Insurance. In the interim guidance, EEOC stated clearly that, in the context of health insurance, it did not consider distinctions between mental health and physical health benefits to be disability-based distinctions. However, given its role in recent litigation on the issue of mental health benefits and insurance parity, it is quite clear that EEOC considers this precise distinction to be a disability-based distinction in the context of long term disability benefits.

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[253] Ibid.

[254] 1997 U.S. Dist. LEXIS 21433 (D.N.M. 1997).

[255] *Id* at *2–*3.

[256] *Id*. at *2.

[257] *See* 121 F.3d 1006, 1015 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998).

[258] 1998 U.S. Dist. LEXIS 8829, *21 (E.D. Va. 1998). The court stated "[w]e conclude that Kmart has discriminated against plaintiff on the basis of his disability in violation of ADA Title I, 42 U.S.C. @ 12112. . ." *Id*.

[259] *Id*. at *14 citing H.R. REP. NO. 45(III) at 70 (1990).

[260] *Id*. at *14.

[261] *Id*. at *7.

[262] *Id*. at *8 citing Virginia Code § 38.2–508.

[263] *Id*. at *8.

[264] *Id*. at *9 citing Trial Transcript at 145.

[265] *Id*.

How EEOC reconciles its different approaches to distinctions between mental and physical illness in health insurance and in disability insurance is not clear. This is a stark contrast to the EEOC approach to cases involving disproportionately low benefits for mental impairments in health insurance. Moreover, at least one court opinion has mentioned the apparent incongruity in EEOC's policy for health insurance as compared to disability insurance and long term benefits coverage.[266]

The reasoning behind the divergence between EEOC's position on mental health insurance parity in its 1993 interim guidance and its position in recent litigation remains unexplained in policy guidance.

In an interview, EEOC's Associate Legal Counsel explained EEOC's rationale for the difference between its positions on disability distinctions in long term disability insurance and on disability distinctions in health insurance. According to her, EEOC's interim guidance instructed investigators to ask two questions: (1) is there a disability-based distinction; and (2) if there is, can the employer defend it? It gave examples of disability-based distinctions, which usually were situations where a discrete disability, such as HIV/AIDS, was not covered. According to the analysis EEOC endorsed in this guidance, in the context of health insurance, singling out the mental/nervous category does not indicate a disability-based distinction. This is because, in the health insurance context, the mental/nervous category encompasses both people with disabilities and those without. For instance, both people with schizophrenia and people who *have no disability* but go to a psychiatrist to improve their lives fall into this category. However, she said, if one applies the same analysis, but changes the context to long term disability benefits or retirement plans, a lot of things are different. In particular, long term disability is only available to individuals with disabilities. Therefore, any mental/physical distinction must single out particular disabilities, thereby making it disability based and thus potentially impermissible under the ADA if it cannot be legitimately justified. Thus, according to EEOC's Associate Legal Counsel, using the analysis endorsed in the interim guidance, there is a disability-based distinction in the context of long term disability plans, but not in the context of health insurance.[267]

EEOC clearly makes a distinction between health insurance and long term disability insurance. However, EEOC has never clarified this in policy guidance or litigation. As a result, it remains unclear why EEOC has taken arguably contradictory policy positions in its interim enforcement guidance and in its recent litigation posture in insurance cases. This is a matter of particular concern considering that at least one court has actually cited to EEOC's interim health insurance guidance as support for a finding that a disability insurance plan distinguishing between physical and mental health benefits did not violate the ADA. In *Weyer v. Twentieth Century Fox Film Corporation*,[268] a Federal district court in Washington State listed the interim guidance as an authority for the statement that:

> The ADA does not prohibit the insurance practice of providing a shorter term of coverage for mental disability than for physical disability. Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997); EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir. 1996); Krauel v. Iowa Methodist Medical Center, 95 F.3d 674, 678 (8th Cir. 1996); EEOC: Interim Enforcement Guidance on Application of ADA to Health Insurance (June 8, 1993).[269]

However, in its litigation and *amicus* briefs, EEOC *has* sought to prohibit the practice of providing a shorter term of coverage for mental than for physical disability in *long term disability* plans, although it has not taken the same position in the context of *health* insurance plans for people who are still working.[270] The apparent confusion of the *Weyer* court on EEOC's position further suggests the need for updated guidance in this area from EEOC.

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[266] Lewis v. Aetna, 982 F. Supp. 1158, 1168 n.9 (E.D. Va. 1997) ("Defendants note that the EEOC has in the past stated that distinctions between mental and physical illness in health insurance do not violate the ADA. *See* EEOC Interim Guidance on Application of ADA to Health Insurance, June 3, 1993. To the extent that this was ever the position of the EEOC with regard to disability plans, it does not appear to be so now.").

[267] Peggy M. Mastroianni, Associate Legal Counsel, EEOC, interview in Washington, DC, Apr. 6, 1998, p. 7.

[268] 1997 U.S. Dist. LEXIS 21708 (W.D. Wash. 1997).

[269] *Id.* at *3.

[270] *See* pp. 146 this chapter.

Qualified Individual with a Disability

EEOC and private litigants are pushing forward with challenges to long term disability insurance plans. For example, in the Fourth Circuit, a district court has ruled against defense motions to dismiss a private party's challenge of disparate benefits provided by the employer's long term disability plan.[271] In the Second Circuit, an argument advanced by defendant's counsel in an ADA case involving a service retirement plan has produced an important ruling in that circuit on an issue not directly addressed by the EEOC in policy or by the ADA's legislative history.

In *Castellano v. New York*,[272] firefighters and police officers in New York City who retired with disability pensions challenged their exclusion from supplemental retirement compensation paid only to employees who retire with 20 years of service. Although the Second Circuit ultimately did not rule in their favor, it upheld their right to bring such a claim against New York City's argument that they were not eligible to sue under the ADA because they were not "qualified" individuals with disabilities.[273] Specifically, New York City argued that these plaintiffs should be excluded from coverage because they could not perform the essential functions of the jobs of firefighters and police officers and therefore were not members of the ADA's protected class.[274]

The court recognized the potentially damaging effects of this argument on future judicial interpretations of Congress' intent in enacting the ADA. It stated simply that:

> as evidenced by the ADA's language and legislative history, it is inconceivable to us that Congress would in the same breath expressly prohibit discrimination in fringe benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees who ceased to be "qualified" at or after their retirement, although they had earned those fringe benefits through years of service in which they performed the essential functions of their employment.[275]

In its decision, the court cited EEOC's *amicus* brief in the case.[276] In this brief EEOC argued:

> The language of the ADA shows that Congress clearly intended to prohibit employers from discriminating in the area of fringe benefits, many of which are distributed in the post-employment period. If former employees may not challenge discrimination in post-employment fringe benefits, the entitlement to which they earned by virtue of employment, Congress' goal of providing comprehensive protection from disability discrimination would be severely undermined.[277]

However, EEOC has not addressed this issue in its policy or enforcement guidance.

HIV/AIDS

Another controversial disability-based distinction that EEOC has addressed in litigation or *amicus* activity is the coverage limits many insurers place on treatment for AIDS patients. The agency has played an active role in bringing such cases, as well as in providing *amicus curiae* briefs to support parties in private litigation.[278] In most of these cases, EEOC has achieved success in working toward a settlement between the parties or a consent agreement prior to a trial.

In one case, an employee sued his employer for providing an insurance plan that excluded him from coverage because of his HIV-positive status.[279] Ruling that the employer's purchase of a health benefit plan subjects the employer to potential liability under the ADA, the court stated, "when a group insurer makes it a policy refusing to extend coverage to an employee with a disability because of that disability, an employer violates the ADA by selecting that group insurer unless he makes provisions for the excluded individual to receive comparable health insurance in some other way."[280]

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[271] *See* Lewis v. Aetna Life Ins. Co, 982 F. Supp. 1158 (E.D. Va. 1997) (denying defendants' motion to dismiss).

[272] 1998 U.S. App. LEXIS 3646 (2nd Cir. 1998).

[273] *See id.*

[274] *Id.* at *22–*23.

[275] *Id. at* *33.

[276] *Id.*

[277] Brief for the U.S. Equal Employment Opportunity Commission as *Amicus Curiae* at 5, Castellano v. City of New York, 1998 U.S. App. LEXIS 3646 (2nd Cir. 1998) (No. 96–7920).

[278] EEOC, Docket of Americans with Disabilities Act (ADA) Litigation. *See, e.g.*, Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994), *appeal docketed*, (D.N.H. 1996); Estate of Mark Kadinger v. Int'l Brotherhood of Electrical Workers, Local 110, 1993 U.S. Dist. LEXIS 18982 (D. Minn. 1993).

[279] Anderson v. Gus Mayer Boston Store of Delaware Inc., 924 F.Supp. 763 (E.D. Texas 1996).

Interpreting the ADA on Health Insurance and Other Benefits

Congress drafted ADA language on health insurance in such a way that much is left to interpretation. While some disability advocates fault insurance and business lobbyists for exerting pressure on Congress to create such ambiguities in the law, members of the insurance industry and business community criticize the law for its lack of specificity and propose amending the ADA. EEOC regulations and the interim enforcement guidance do not provide sufficient clarity. Thus, courts are left to fill in the blanks, particularly in contentious areas, such as the role of actuarial data and the disparity in benefits for mental and physical illnesses contained by many insurance plans. Without clear guidance, however, court interpretations are likely to vary among the Federal circuits, to be decided definitively only by the Supreme Court.

In an informal guidance letter dated April 10, 1997, EEOC stated that it was continuing to study the issue of health insurance under the ADA as it prepared final guidance on the topic.[281] EEOC also stated that its proposed final guidance would revisit the issues addressed in the interim guidance as well as additional issues on the ADA and health insurance that were not discussed in the interim guidance.[282] Finally, EEOC stated in this policy letter that, before publishing a proposed draft of this final guidance in the *Federal Register*, the agency would allow for comment by the public and other interested parties.[283]

In August 1997, the EEOC's proposed "Guidelines on the Application of the Americans with Disabilities Act of 1990 to Employer-provided Health Insurance" were withdrawn from the regulatory agenda.[284]

Preemployment Inquiries and Medical Examinations

EEOC's enforcement guidance on preemployment inquiries and medical examinations, issued in October 1995, addresses how medical information may be used by employers.[285] According to EEOC's *FY 1994 Annual Report*, the agency has received more questions on these topics than on any other ADA issue. Although EEOC developed this document primarily to assist investigators in processing ADA discrimination charges, it provides valuable information for employers and individuals protected by the ADA on permissible and prohibited preemployment inquiries and examinations.[286]

In drafting the ADA, Congress recognized that individuals with disabilities can face employment discrimination before their ability to perform the job is even evaluated. In the past, some employment applications and interviews requested information about a prospective employee's physical or mental conditions and health.[287] Employers might use information about applicants' health status to rule out those who disclosed disabilities without evaluating their ability to perform the job in question. To address such discrimination, Congress incorporated into the ADA specific provisions to prevent any information on an applicant's medical condition from influencing the evaluation of an applicant's nonmedical job-related qualifications.[288]

The ADA prohibits employers from asking disability-related questions and requiring medical examinations before making an applicant a conditional job offer.[289] In general, at the preoffer stage, an employer may not conduct a medical examination or ask if a job applicant has a disability or the nature or severity of such a disability.[290] It is acceptable for an employer to inquire about the ability of an applicant to perform job-related functions.[291]

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[280] *Id.* at 769.

[281] Mastroianni letter, p. 1366.

[282] Ibid.

[283] Ibid.

[284] 62 Fed. Reg. 58,201 (1997).

[285] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations" (undated), p. 1. In May 1994, EEOC issued a previous enforcement guidance on this topic. However, all references to EEOC's guidance on this topic refer to the October 1995 document.

[286] Ibid.; EEOC, *FY 1994 Annual Report*, pp. 4, 23.

[287] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations."

[288] *See* 42 U.S.C. § 12112(d) (1994). *See also* EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 1.

[289] 42 U.S.C. § 12112(d) (1994).

Under the statutory provision, an employer may require a medical examination after an offer of employment has been made to a job applicant and before the applicant starts on the job.[292] However, the employer may only do so if all entering employees are subjected to the same examination.[293] The information obtained about the medical condition or history of the applicant must also be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.[294] The only exceptions to the confidentiality rule are that supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and government officials investigating compliance with the ADA shall be provided relevant information on request.[295]

Finally, the provision states that an employer cannot require a medical examination or ask if the employee is an individual with a disability or about the nature or severity of the disability, unless the examination or inquiry is shown to be "job-related and consistent with business necessity."[296] An employer may conduct voluntary medical examinations, including voluntary medical histories, that are part of an employee health program available to employees at that worksite.[297] In addition, an employer may make inquiries into the ability of an employee to perform job-related functions.[298]

Statutory and Regulatory Authority

The enforcement guidance opens with a discussion of the ADA statutory and regulatory authority governing employer inquiries about applicant or employee health status. The ADA prohibits an employer from asking an applicant disability-related questions or performing medical examinations before extending the applicant a conditional job offer.[299] According to the guidance, even if the employer intends to review answers or test results after an offer has been made, the employer still may not ask such questions or require a medical exam before the offer.[300] The rationale for this provision is that it helps to ensure that an applicant's possible hidden disabilities are not considered until after the employer has evaluated the applicant's *nonmedical* qualifications.[301]

However, the guidance explains that even though employers may not legally ask disability-related questions at the pre-offer stage, they still have considerable latitude in ensuring that an applicant is qualified to perform a given job. Employers may ask about an applicant's ability to perform specific job functions. The guidance gives three examples of the kinds of questions an employer may ask. According to the guidance, "an employer may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements";[302] an employer may ask about an applicant's nonmedical qualifications and skills, such as education, work history, and required work licenses and certifications;[303] and employers may ask job applicants to describe or explain how they would perform a specific task.[304]

At least one organization in the disability community finds fault with this specific section of the guidance.[305] An official from the organization has stated that EEOC considers it unlawful for an employer to ask if a job applicant needs a reasonable accommodation because this is tantamount to asking whether the applicant has a disability.[306] Instead, EEOC recommends that an employer ask if the applicant can perform a specific job task with or without reasonable accommodation. This official states that "a question like that is really useless. It may work in a legal sense; it does not work in the real world."[307] This official further states: "I would urge EEOC to work on a program (in its technical assistance capacity) that instructs all employers on the value of developing up-to-date job descriptions based on a job analysis, and sharing that information with all applicants."[308]

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[290] *Id.* at § 12112(d) (2) (A).

[291] *Id.* at § 12112(d) (2) (B).

[292] *Id.* at § 12112(d) (3).

[293] *Id.* at § 12112(d) (3) (A).

[294] *Id.* at § 12112(d) (3) (B)

[295] *Id.*

[296] *Id.* at § 12112(d) (4) (A).

[297] *Id.* at § 12112(d) (4) (B).

[298] *Id.*

[299] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 2 (citing 42 U.S.C. § 12112(d) (2) (1994) and 29 C.F.R. §§ 1630.13(a), 1630.14(a) and (b) (1997)).

[300] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 2.

[301] Ibid.

[302] Ibid.

[303] Ibid.

[304] Ibid.

[305] Fritz Rumpel, Editor, *Employment in the Mainstream*, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, re: response to questionnaire on the ADA, Feb. 4, 1998, p. 2.

The guidance next states that, once a conditional offer has been made, the employer legally may ask disability-related questions and require a medical examination of an employee only if this practice is followed for all employees hired for the same job category.[309] However, if an employer rejects the applicant after a disability-related question or medical examination, EEOC emphasizes that it trains its investigative staff to "closely scrutinize whether the rejection was based on the results of that question or examination."[310] In addition, if it is determined that a question or examination screened out an individual due to a disability, the employer must show that the reason for the failure to hire was "job related and consistent with business necessity."[311] Lastly, if the applicant is screened out for safety reasons, the employer must show that the individual posed a "direct threat" as defined in the ADA. This means that the applicant would have posed a "significant risk of substantial harm to himself or others" and that there was no reasonable accommodation that could reduce that risk level.[312]

Finally, this section of the guidance emphasizes that the ADA requires employers to keep medical information confidential.[313] The guidance notes that the exceptions to this rule are narrowly limited to specific information that may be shared with supervisors and managers, first aid and safety personnel, and government officials investigating compliance with the ADA. In addition, employers may lawfully disclose medical information to State workers' compensation offices, State second injury funds, workers' compensation insurance carriers in accordance with State workers' compensation laws, and for insurance purposes.[314]

The Pre-Offer Stage

The proscriptions on employers at the pre-offer stage appear particularly complex. Guidance that may be helpful to employers explains the broad underlying principles on which the ADA's requirements at the pre-offer stage are based:

> As a general matter, the key to effective, permissible questioning at the pre-job-offer stage is to focus on the *functions* of the job rather than the possible disabilities of the applicant. An employer can usually determine whether an applicant is qualified for a job by correctly phrasing questions regarding an applicant's ability to perform the job's functions.[315]

What Is a Disability-related Question?

EEOC's definition of a "disability-related" question is "a question that is likely to elicit information about a disability."[316] At the pre-offer stage, an employer is not permitted to ask disability-related questions or questions that are likely to elicit information about a disability.[317] Obviously, an employer cannot ask whether an applicant has a particular disability. In addition, an employer is not permitted to ask questions that are closely related to disability. However, the guidance states that "if there are many possible answers to a question and only some of the answers would contain disability-related information, that question is not 'disability-related'."[318]

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[306] Ibid.

[307] Ibid.

[308] Ibid.

[309] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 2.

[310] Ibid.

[311] Ibid.

[312] Ibid., p. 3 (citing 42 U.S.C. § 12113(b) (1994); and 29 C.F.R. pt. 1630 app. § 1630.2(r) (1997)).

[313] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 3 (citing 29 C.F.R. § 1630.14(b) (1) (i)–(iii) (1997)).

[314] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 3 (citing 42 U.S.C. § 12201(c) (1994); and 29 C.F.R. pt. 1630 app. § 1630.14(b) (1997)).

[315] Robert L. Burgdorf, Jr., *Disability Discrimination in Employment Law*, p. 347 (Washington, DC: Bureau of National Affairs, 1995).

[316] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 4. *See also* Peggy Mastroianni, Associate Legal Counsel, EEOC, letter to Savannah Police Dept., re: Application Inquiries, Jan. 17, 1997, p. 2, *reprinted in* 10 Nat'l Disability L. Rep. (LRP) ¶ 74 (hereafter cited as Mastroianni, letter re: Application Inquiries).

The guidance addresses some commonly asked questions about this area of the law. According to the guidance, an employer may ask whether applicants can perform a job, including whether they can perform job functions "with or without reasonable accommodations." An employer may ask job applicants to describe or demonstrate how they would perform a given job, including any needed reasonable accommodations. An employer may ask a particular applicant to demonstrate how he or she would perform a given job function, even if other applicants are not asked the same question, only "when an employer could reasonably believe that an applicant will not be able to perform a job function because of a known disability."[319] In such a case, "the employer may ask the particular applicant to describe or demonstrate how s/he would perform the function."[320] In addition, an employer may ask applicants whether they will need reasonable accommodation to complete the hiring process (for example, an interview, timed written test, or job demonstration).[321] Similarly, an employer may ask an applicant whether he or she can perform different functions of the job itself, including whether an applicant can perform job functions "with or without reasonable accommodation."[322]

However, an employer may not "ask a question in a manner that requires the individual to disclose the need for reasonable accommodation."[323] For example, an employer cannot ask a question relating to reasonable accommodation in the following manner, "Can you do these functions with ___ or without ____ reasonable accommodation? (Check one)."[324] Moreover, although an employer may ask whether an applicant can perform job functions "with or without reasonable accommodation," as a general rule, in the pre-offer stage, an employer "may not ask whether an applicant will need reasonable accommodation. . .because these questions are likely to elicit whether the applicant has a disability."[325]

Making matters more complicated, although an employer may ask an applicant with a "known disability" whether he or she needs a reasonable accommodation to perform a job function, if the applicant answers "no," the employer may not pursue the matter by asking additional questions.[326] If the applicant answers "yes," the employer may ask additional questions about *how* to provide the accommodation but may not ask questions about "the underlying condition."[327] For example, if an applicant for a computer analyst job with a severe vision impairment asks for software that increases the size of the text on the screen, the employer may ask questions about that software, such as how to obtain it.[328] However, the employer may not ask the applicant any questions about the nature or extent of his vision impairment.[329]

Although the guidance makes clear that the main rule about pre-offer questions is that they may not be designed to elicit information about whether an applicant has a disability, it should be noted that, as the questions and answers provided in the guidance show, the rules surrounding what an employer may and may not say are complicated. For example, an employer may ask if an applicant can meet the employer's attendance requirements, including questions about an employee's former attendance record.[330] However, an employer may not ask, at the pre-offer stage, how many days an applicant was sick or on sick leave in the former position, because this question relates directly to the *severity* of an individual's impairments, one of the criteria used to determine whether an impairment is "substantially limiting" to a major life activity and therefore a disability.[331]

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[317] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 4.

[318] Ibid.

[319] Ibid., p. 5. This also would apply in the case of an applicant who has voluntarily disclosed a hidden disability. Ibid.

[320] Ibid.

[321] Ibid.

[322] Ibid., p. 4.

[323] Ibid., p. 4, n. 11; p. 6.

[324] Ibid.

[325] Ibid., p. 6.

[326] Ibid., p. 7.

[327] Ibid.

[328] Ibid.

[329] Ibid.

[330] Ibid., p. 8.

On the other hand, an employer may ask about the applicant's *impairments*, since only impairments that substantially limit major life activities are disabilities under the ADA; not all impairments are disabilities. Therefore, because a broken leg generally is considered too temporary to meet the criteria for an impairment that is substantially limiting to a major life activity, it is only an impairment and not a disability under the ADA, and an employer could ask an applicant with a broken leg questions about the broken leg, such as how it happened.[332] Since the broken leg is only an impairment and does not reach the level of a disability under the ADA, questions about the broken leg are not likely to elicit information about a *disability*. However, if an employer asks such questions as "Do you expect the leg to heal normally?" or "Do your bones break easily?" then, according to the guidance, the employer has entered a potentially dangerous area because these questions are more likely to elicit information about an underlying disability of more severity and permanence than a broken leg.[333] In another example in the guidance, an applicant for a receptionist position who discloses that she will need periodic breaks to take medication may be legally asked about how long the breaks must last and how often they will be needed but may not legally be asked the medical reason *why* she is taking medication.[334]

The guidance answers several other questions relating to pre-offer questions. For example, the guidance states that an employer may ask applicants about their certifications and licenses because "[t]hese questions are not likely to elicit information about an applicant's disability because there may be a number of reasons unrelated to disability why someone does not have—or does not intend to get—a certification/license."[335] Employers may ask applicants about arrest and conviction records for the same reason.[336] Generally, employers may not ask whether applicants can perform major life activities such as standing, lifting, or walking because such questions "are likely to elicit information about a disability," since "if an applicant cannot stand or walk, it is likely to be a result of a disability."[337] The exception to this rule is if the employer is asking specifically about the ability to perform a job function.[338]

The guidance states that employers may not ask applicants questions about their workers' compensation history at the pre-offer stage, again, because such questions are likely to elicit information about a disability. Questions about workers' compensation go directly to the *severity* of an impairment, and severity is a criterion for determining whether an impairment reaches the level of a disability under the ADA.[339] In addition, employers made not ask questions about lawful drug use, since these questions also go to the severity of an impairment. The exception here is if the employer is administering a test for illegal drugs and an applicant tests positive for drug use, in which case an employer can inquire as to *lawful* drug use to find possible explanations for the positive result, other than illegal drug use.[340] Similarly, an employer may ask questions about prior illegal drug use, so long as the employer does not ask about prior *addiction* to drugs, since this is a covered disability under the act.[341] Finally, the guidance states that an employer may ask applicants to "self-identify" themselves as persons with disabilities only where the employer is asking for purposes of the applicant's participation in the employer's affirmative action program for employees with disabilities.[342]

Although the guidance attempts to clarify EEOC's position with respect to disability-based inquiries during the interview and screening process at the pre-offer stage, it nonetheless suggests a fairly complicated and highly specific set of "do's" and "don'ts" of which employers must be aware. For example, according to the guidance, an employer may ask an applicant if he or she can perform job functions "with or without reasonable accommodation," and, in addition, an employer may ask if an applicant will need reasonable accommodation for the hiring process. However, "an employer may not ask a question in a manner that requires an individual to disclose the need for reasonable accommodation."[343] Being permitted to ask whether an applicant can perform job functions with or without reasonable accommodation but not being permitted to ask an individual a question *in a manner* that might require the applicant to disclose the need for reasonable accommodation seems a subtle distinction that easily could be misunderstood.

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[331] Ibid.

[332] Ibid., p. 9.

[333] Ibid.

[334] Ibid.

[335] Ibid., p. 8.

[336] Ibid., p. 9.

[337] Ibid.

[338] Ibid., pp. 9–10.

[339] Ibid., p. 10.

[340] Ibid., p. 11.

[341] Ibid.

[342] Ibid., p. 12.

Complexities on points of law discussed in the guidance suggest that these issues may require EEOC's particular attention with respect to technical assistance and outreach and education efforts. For example, with regard to the concept of "major life activity," the guidance states that since questions about whether an applicant can perform a major life activity such as standing, lifting, walking, etc. "are almost always disability-related because they are likely to elicit information about a disability," such questions are therefore largely impermissible, "unless they are specifically about the ability to perform job functions."[344]

Knowing what an employer can and cannot ask is a complicated matter that can lead to confusion about the questions that are permissible under the ADA. Clearly, these examples and the complicated nature of the reasoning on which they are based indicate that employers must be *very* familiar with the ADA in the hiring process. As the questions and answers discussed in the guidance suggest, before conducting an interview, an employer must be fully aware of the distinction between an *impairment* and a *disability* under the ADA. An employer also must be familiar with the distinction between a "disability-related" question and one that is not, and understand why this distinction is an important one. Moreover, an employer must be aware of and understand technical terminology, such as "substantial limitation" and "major life activity." These are just two terms from the statute an understanding of which can mean the difference between interview questions that are permissible under the ADA and those that are not.

Thus, it appears that because of the sheer complexities associated with preemployment inquiries and medical exams, any employer who has not read EEOC's guidance thoroughly is in danger of running afoul of the statute. More than any other ADA-related issue, this one seems to require the strongest efforts on the part of EEOC to ensure dissemination of education to all job applicants, employers, and businesses. These efforts will require a significant amount of technical assistance, outreach, and education to ensure that all of these stakeholders have a good understanding of how to proceed through the various stages of the hiring process.

Due to the complexities involved in this area of ADA law, it is particularly useful for employers, human resources staff, and private attorneys, as well as individuals with disabilities, to have access to as much information as possible relating to preemployment medical examinations and medical inquiries under the ADA. In meeting this need, EEOC has worked in partnership with other government agencies and the private sector in developing technical assistance documents on these issues. For example, EEOC provided legal sufficiency review of papers developed by staff at Cornell University's School of Industrial and Labor Relations under a grant from the National Institute on Disability and Rehabilitation Research.[345] These papers were published by LRP Publications, a legal publisher, as part of its "ADA Practice Series" and issued in 1993.[346] They provide information to employers on these ADA hiring issues in a user-friendly question and answer format similar to that used by EEOC in its enforcement guidance.

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[343] *See* Ibid., p. 4 n. 11.

[344] Ibid., pp. 9–10.

[345] *See* Miaskoff interview, p. 2. Ms. Miaskoff stated "the coordination unit has reviewed a lot of technical assistance material that was funded by NIDRR grants. The Cornell School of Industrial Relations did a lot of these. One of the conditions of these grants was that all technical assistance documents be reviewed and approved for legal sufficiency by EEOC." Ibid.

[346] *See* Marjorie E. Karowe, *Employment Screening, Medical Examinations, Health Insurance, and the Americans with Disabilities Act* (Horesham, PA: LRP Publications, 1993); Mary Anne Nester, "Pre-Employment Testing and the ADA" (Cornell University, School of Industrial and Labor Relations and National Institute on Disability and Rehabilitation Research, 1993).

EEOC should be commended for assisting in the development and dissemination of these kinds of publications. However, it remains unclear to what extent or whether EEOC has worked with outside organizations in developing technical assistance materials on these issues in the period since 1993.

What Is a Medical Examination?

The guidance defines a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health."[347] The guidance states that at the pre-offer stage of the hiring process, an employer may not require examinations that seek information about physical or mental impairments or health.[348] However, because "it is not always easy to determine whether something is a medical examination," the guidance lists several inquiries to use in determining whether a procedure is medical in nature, including:[349]

(1) Is it administered by a health care professional or someone trained by a health care professional?

(2) Are the results interpreted by a health care professional or someone trained by a health care professional?

(3) Is it designed to reveal an impairment or physical or mental health?

(4) Is the employer trying to determine the applicant's physical or mental health or impairments?

(5) Is it invasive (i.e., drawing of blood or urine)?

(5) Does it measure an applicant's performance of task, or does it measure the applicant's physiological responses to performing the task?

(6) Is it normally given in a medical setting (i.e., doctor's office)?

(7) Is medical equipment used?[350]

The guidance provides examples that help to clarify its main points on pre-offer medical examinations. For example, the guidance notes that in many cases, a combination of factors may be necessary in determining whether a procedure or test is a medical examination under the ADA. To show the distinction between a nonmedical and a medical examination, the guidance uses the example of a test in which an employer requires applicants to lift a 30-pound box and carry it 20 feet.[351] The guidance notes that, as described, this test is not a medical examination; it is merely a test of whether an applicant can perform a job-related task. However, the guidance observes that if the employer takes the applicant's blood pressure or heart rate after he or she has performed the task, then the test would be a medical examination and would be impermissible at the pre-offer stage.[352]

The guidance states that both physical agility tests and physical fitness tests are not considered medical examinations, and thus are permissible at the pre-offer stage. However, the guidance adds the caveat that such tests may be in violation of other laws or other parts of the ADA.[353] Therefore, an employer that administers such tests at the pre-offer stage must be able to show that the practice of administering these tests is job-related and consistent with business necessity.[354] The guidance also states that, generally, polygraph, nonmedical vision, and illegal drug use tests are all permissible under the ADA, while alcohol tests are not.[355]

As with other issues relating to ADA, Federal courts rely on EEOC's guidance in analyzing issues relating to preemployment inquires and medical examinations at the pre-offer stage. For example, in *Grenier v. Cyanamid Plastics, Inc.*,[356] the First Circuit reviewed a case in which a former employee seeking reinstatement after returning from disability leave argued that a medical certification requested by his employer to show he was again able to perform the functions of his job constituted a violation of the ADA. Former employee Andre Grenier argued that the employer violated the ADA on two grounds: first, by requesting a medical certification, which Grenier argued was a medical examination as defined under the ADA and therefore impermissible at the pre-offer stage; and, second, that the medical certification constituted an impermissible request for information to determine whether the employee was an individual with a disability and, if so, the nature and severity of that disability.[357]

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[347] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 14.

[348] Ibid.

[349] Ibid.

[350] Ibid.

[351] Ibid.

[352] Ibid., p. 13–14.

[353] Ibid. p. 15, n. 16, n. 17.

[354] Ibid. For example, if such a test has an adverse impact under title VII, or if such a test screens out applicants on the basis of disability, the employer must show that the test is job related and consistent with business necessity. Ibid.

[355] Ibid., p. 17.

[356] 70 F.3d 667 (1st Cir. 1995).

The First Circuit found with regard to the first issue that the medical certification was not an impermissible medical examination. Relying on EEOC's guidance, the court noted:

> The EEOC defined "medical examination" as follows: Medical examinations are procedures or tests that seek information about the existence, nature, or severity of an individual's physical or mental impairment, or that seek information regarding an individual's physical or psychological health. (citation omitted) We conclude that a certification from a treating psychiatrist that does not necessitate new tests or procedures is best analyzed as an "inquiry" rather than as a "medical examination."[358]

The court also disagreed with Grenier's claim that the medical certification constituted an impermissible request for information about his disability.[359] Again relying on EEOC's reasoning in its guidance on the pre-offer stage, the court noted that where an employer is aware of the precise nature of a prospective employee's disability, either because it is obvious or because the applicant voluntarily has disclosed the disability, an employer may inquire how the applicant would perform the essential functions of the job, including what kind of reasonable accommodation the applicant may need.[360] Moreover, the court observed that the guidance stated that the rationale behind this rule was "to ensure that an applicant's possible hidden disability (including prior history of a disability) is not considered by the employer prior to the assessment of the applicant's non-medical qualifications."[361] However, the court noted that "[w]ith respect to known disabilities," EEOC's guidance indicates that once an employer is aware of the presence of a disability, the employer may begin to, and is encouraged to, "engage in an interactive process with the individual to determine an effective reasonable accommodation."[362]

Under the court's reasoning, the facts in *Grenier* placed it squarely within the category of cases where the employer has full knowledge of the prospective employee's disability.[363] Therefore, the court applied EEOC's guidance on the pre-offer stage relating to situations involving a job applicant with a known disability:

> There could be no meaningful interaction if this court would accept the strict interpretation. Grenier presses on us that an employer who knows the precise nature of a disability that interferes with essential job functions cannot, on being informed pre-offer that accommodation will be necessary, follow up with the logical question "what kind?" In sum, an employer does not violate §12112(d)(2) of the ADA by requiring a former employee with a recent known disability applying for re-employment to provide medical certification as to ability to return to work with or without reasonable accommodation, and as to the type of any reasonable accommodation necessary, as long as it is relevant to the assessment of ability to perform essential job functions.[364]

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[357] *Id.* at 674–75.

[358] *Id.* at 675–76.

[359] *Id.* at 676. The court further noted that the defendant argued that Grenier should be treated as an existing employee returning from disability leave, in which case it would be able to demand medical certification of ability to return to work under the ADA provisions for medical examinations of existing employees. *Id.* at 676–77 (citing 42 U.S.C. § 12112(d) (4) (1994)).

[360] *Id.* at 677 (citing EEOC, "Preemployment Disability-Related Questions and Medical Examinations," pp. 6–7).

[361] *Id.*

[362] *Id.*

[363] In a similar case under the Rehabilitation Act, Brumley v. Pena, 62 F.3d 277 (8th Cir. 1995), the Eighth Circuit addressed a factual situation in which a mentally disabled former employee of the Federal Aviation Administration (FAA) who sought priority consideration for restoration to Federal employment under a statutory scheme that predicated the level of priority for reemployment on the extent of recovery from the disability. He challenged the agency's demand for a preemployment examination by a psychiatrist to determine whether he was fully or only partially recovered from his severe reactive depression. *Id.* at 279. In questioning the application of the statute's regulations, the court noted that "the dilemma here is that Brumley is not an outside job applicant seeking employment at the FAA for the first time Rather, he is a recipient of. . .disability payments who is seeking to exercise his re-employment rights with the FAA." *Id.* The court concluded that the employer "retains the right to require that [the former employee's] medical condition be verified in order to determine his re-employment rights." *Id.*

[364] Grenier, 70 F.3d at 677–78.

The *Grenier* case provides a good example of how EEOC's enforcement guidance on ADA issues has been influential in helping the courts to analyze ADA issues, and, in turn, shape ADA law relating to these issues. EEOC's guidance on preemployment inquiries and medical examinations has been particularly useful given the complexities and nuances of ADA law in this area. EEOC's guidance has afforded the courts a useful point of departure for analyzing issues not directly addressed in the law itself or its legislative history, such as the application of pre-offer inquires and medical examinations for employees with known disabilities seeking reinstatement to their former positions.

The Post-Offer Stage

Once an employer has made a conditional offer of employment, under the ADA, the process has entered a new and significantly different second stage that allows the employer to scrutinize more closely the qualifications of the prospective employee.[365] The guidance explains that the employer may now ask disability-related questions and perform medical examinations, as well as ask about an individual's workers' compensation history; prior sick leave usage, illnesses, diseases, or impairments; and general physical and mental health.[366] Moreover, an employer may ask for followup medical examinations for some individuals, may ask all individuals whether they need reasonable accommodation to perform the job, and may ask for documentation of disability from those individuals who request reasonable accommodation.[367] However, if an employer asks post-offer disability-related questions or requires post-offer medical examinations, the employer must ensure that all entering employees in the same job category are subjected to the examination or inquiry *regardless of disability*, and keep all medical information obtained confidential.[368]

The guidance states that a "real" or bona fide job offer has been made when "the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer."[369] The guidance notes that there may be times when it is impossible for an employer to obtain and evaluate all nonmedical information at the pre-offer stage. For example, if an applicant requests an employer not to do a reference check until after a conditional offer is made, it would be impossible for the employer's offer to be "real."[370] It is a violation of the ADA for an employer to make a real, conditional offer of employment to the applicant only after conducting an examination.[371] This kind of violation has been termed a "premature medical examination."[372]

The caselaw offers an example that addresses the "premature medical examination" violation. In *Buchanan v. City of San Antonio*,[373] a patrolman for a local sheriff's department who suffered from an on-the-job back injury sought a job with the San Antonio police force. In *Buchanan*, the Fifth Circuit determined that a medical examination conducted *after* a conditional offer of employment was still a "premature medical examination" where the employer, in this case the City of San Antonio, included the medical examination as a condition of employment along with the entire screening process, including nonmedical testing. The court wrote:

> Buchanan established through the city's own records that Buchanan was given a medical examination in August of 1992. . . . We cannot agree with the city that it conducted a medical examination only after it had made a conditional offer of employment. While Buchanan did sign an acknowledgment in May of 1992 that he was receiving a conditional offer of employment, the document itself makes clear that the

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[365] 42 U.S.C. 12112(d) (3) (1994) (explaining that an employer may condition an offer of employment on the results of a preemployment medical examination).

[366] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 18.

[367] Ibid., pp. 19-20.

[368] Ibid.

[369] Ibid.

[370] Ibid., p. 19.

[371] *See* 42 U.S.C. 12112(d) (2)–(3) (1994).

[372] Jan W. Sturner, "Comment: Preemployment Medical Exams Under the ADA: Conditional Job Offers and the Application of the Mixed-Motives Framework," *Arkansas Law Review* vol. 50 (1997), pp. 449, 453 (hereafter cited as Sturner, "Preemployment Medical Exams") (citing Buchanan v. City of San Antonio, 85 F.3d 196, 199–200 (5th Cir. 1996) (reading the ADA to require a causal link between a prohibited medical examination under the ADA and the damages sought by plaintiff)).

[373] 85 F.3d 196 (5th Cir. 1996).

> offer was not conditioned solely on a medical examination, but was instead conditioned on successful completion of "the entire screening process," which included "physical and psychological examinations, a polygraph examination, a physical fitness test, an assessment board, and an extensive background investigation."[374]

An employer also will violate the statute by failing to treat medical information obtained from a preemployment examination as confidential or to keep the information in a separate file.[375] The guidance addresses the statute's requirements for employer confidentiality at the post-offer stage. An employer must keep all medical information confidential with a few "limited exceptions," including certain supervisors and managers, first aid and safety personnel, government officials investigating compliance with ADA, and State workers' compensation offices; and for insurance purposes.[376]

Also with regard to confidentiality requirements, the guidance notes that an employer's obligation extends to medical information voluntarily disclosed by an individual. The employer's confidentiality requirement does not end when the person is no longer an employee or an applicant.[377] Finally, an employer may not keep medical information in an employee's regular personnel file, although employers are not required to remove medical information obtained before the ADA's effective date from employee personnel files.[378]

Workers' Compensation and the ADA

In September 1996, EEOC issued enforcement guidance on workers' compensation and the ADA.[379] This document covers a number of issues, in question and answer format, including confidentiality of medical information, hiring decisions, return to work decisions, reasonable accommodation, light duty, and exclusive remedy provisions in workers' compensation laws.[380]

EEOC notes that the ADA and workers' compensation laws are not in conflict. However, the interaction among them has raised many questions for EEOC investigators, employers, and individuals with disabilities.[381] One commentator noted:

> the most significant impacts of the ADA in the workers' compensation context are most likely the prohibition on screening applicants through preemployment medical examinations or questions, the restrictions on the use of medical examinations generally, and the limited authorized use and dissemination of the results of such examinations. Another major impact of the ADA on workers' compensation is the requirement that employers retain workers injured on the job, even when the worker may no longer be able to perform all of the duties of that job.[382]

The key difference between the ADA and workers' compensation laws is that the ADA is a civil rights law designed to address employment discrimination. The purpose of State workers' compensation laws is to compensate employees for lost wages or earnings potential.[383] Thus, the ADA is applied differently from workers' compensation laws. For example, to determine the applicability of a workers' compensation law, the State must first determine whether the claimant has suffered loss of wages or a future loss of wages due to a work-related injury. Under the ADA, one must determine if the individual has a disability under the law and if that person is a "qualified individual" under the law. Further, workers' compensation laws have no requirement for the provision of reasonable accommodation.[384]

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[374] 85 F.3d at 199.

[375] *See* 42 U.S.C. § 12112(d) (3) (B) (1994). *See also* Sturner, "Preemployment Medical Exams," p. 453.

[376] EEOC, "ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations," p. 21.

[377] Ibid., pp. 22-23.

[378] Ibid.

[379] EEOC, "EEOC Enforcement Guidance: Worker's Compensation and the American with Disabilities Act," (EEOC Notice 915.002), Sept. 3, 1996 (hereafter cited as "Enforcement Guidance: Workers' Compensation and the ADA").

[380] Ibid., pp. 1–2.

[381] Ibid., p. 3.

[382] Ranko Shiraki Oliver, "The Impact of Title I of the Americans with Disabilities Act of 1990 on Workers' Compensation Law," *University of Arkansas Little Rock Law Journal*, vol. 16 (1994), p. 349 (hereafter cited as Oliver, "The Impact of Title I of the ADA on Workers' Compensation Law").

[383] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," p. 1; Barbara C. Deinhardt, "Title I of the Americans with Disabilities Act and Workers' Compensation: A Call for Discussion," *Employee Benefits Journal*, vol. 18, no. 4 (December 1993), p. 20 (hereafter cited as Deinhardt, "Title I of the ADA and Workers' Compensation").

[384] Deinhardt, "Title I of the ADA and Workers' Compensation," pp. 21, 23.

Disabilities and Occupational Injuries

According to the EEOC guidance, not everyone with an occupational injury has a disability for purposes of the ADA.[385] A person who has suffered an occupational injury is covered under the ADA only if the injury is a physical or mental impairment that substantially limits a major life activity, if the individual has a record of an impairment that substantially limits a major life activity, or if the individual is regarded as having an impairment that substantially limits a major life activity, as defined in the statute.[386] The guidance states that occupational injuries that are temporary, nonchronic, or have little or no long term impact do not meet the definition of disability under the ADA. Further, an impairment that results from an occupational injury may not be severe enough to impose a substantial limit on a major life activity.[387]

The guidance also states that having filed a workers' compensation claim does not necessarily mean that an employee has a record of having a disability under the ADA. An employee who has or has had an occupational injury is considered to have a record of having a disability under the ADA only if the individual has a history of having a mental or physical impairment that substantially limits one or more life activities, or has been misclassified as such. Further, a person with an occupational injury may have a disability under the ADA if he or she is viewed as having an impairment that limits a major life activity, is limited in a major life activity because of the attitudes of others, or is treated as if he or she has a substantially limiting impairment. For example, if an employee has recovered from an occupational injury, but the employer views him or her as not being able to perform the duties of the job because of the injury, that employee is regarded by the employer has having an impairment that substantially limits the major life activity of working, and thus is covered under the ADA.[388]

One commentator has noted inconsistency in EEOC's guidance concerning occupational injuries as disabilities. According to this commentator, EEOC states that a person with a temporary injury does not have a disability under the ADA. However, persons who are "regarded as" disabled are covered. Thus, "[a]n attorney for a worker with a broken leg who was refused an accommodation could argue that the employer regarded the worker as having a disability."[389] In fact, this issue is addressed in the EEOC enforcement guidance. The discussion of the "regarded as" prong provided by EEOC includes the example of an employee with an occupational injury that resulted in a temporary back impairment. Although this impairment does not substantially limit a major life activity, the employer views the employee as not being able to perform some of the essential functions of the job. Thus, this employee would have a disability under the ADA.[390]

Questions and Examinations

According to the guidance on workers' compensation, it is only after a conditional offer of employment has been made that an employer may require a medical examination[391] or inquire about an applicant's prior workers' compensation claims or occupational injuries.[392] However, such requests may be made only if they are made of all employees. Further, an employer may not, at any time, obtain from third parties information on workers' compensation claims or occupational injuries that it cannot obtain lawfully from the applicant.[393]

To determine if an employee is able to perform the essential functions of the job or to determine if an employee's condition poses a direct threat,[394] an employer may ask disability-related questions or require a medical examination of an employee at the time he or she suffers an occupational injury or when the employee seeks to return to work after the injury. Such questions or examination must be job related and consistent with business necessity and may not go beyond the scope of the specific occupational injury experienced. Similarly, an employer may ask disability-related questions or require a medical examination of an employee who has had an occupational injury to determine the extent of its liability under workers' compensation laws. An employer also may request relevant information when an employee requests a reasonable accommodation to a disability-related occupational injury.[395]

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[385] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," p. 2.

[386] *See* 42 U.S.C. § 12102(2) (1994). *See also* EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," p. 2.

[387] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," p. 2.

[388] Ibid., pp. 2–3.

[389] Edward M. Welch, *Employer's Guide to Workers' Compensation* (Washington, DC: Bureau of National Affairs, 1994), pp. 12–13.

[390] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," p. 3.

[391] EEOC provides more detailed information on disability-related questions and medical examinations in a separate enforcement guidance. EEOC, "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" (undated) (hereafter cited as EEOC, "Preemployment Disability-Related Questions and Medical Examinations").

[392] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," pp. 4.

[393] Ibid., pp. 4–5.

Medical information collected on an employee must be kept confidential. Such information should be collected on separate forms and maintained in a separate medical file. The information can be disclosed to supervisors and managers (so that they may know about the necessary work restrictions of the individual); first aid and safety personnel, if necessary; and government officials conducting investigations of compliance with the ADA. In addition, confidential medical information may be disclosed, in accordance with State workers' compensation laws, to State workers' compensation offices, State second injury funds, and workers' compensation insurance carriers. Employers may also report medical information for insurance purposes.[396]

Hiring and Return to Work Decisions

EEOC states that an employer may not refuse to hire an individual with a disability because it assumes that person will be at greater risk to experience an occupational injury and thus raise the employer's workers' compensation costs, even if that individual has experienced a prior occupational injury:

> Where an employer refuses to hire a person because it assumes, correctly or incorrectly, that, because of a disability, s/he poses merely some increased risk of occupational injury and, therefore, increased workers' compensation costs), the employer discriminates against that person on the basis of disability. The employer can refuse to hire the person only if it can show that his/her employment in the position poses a "direct threat." This means that an employer may not "err on the side of safety" simply because of a potential health or safety risk. Rather, the employer must demonstrate that the risk rises to the level of a direct threat.[397]

Similarly, an employer may not refuse to return to work an employee with a disability-related occupational injury nor require such an employee to be able to return to "full duty" before returning to work.

According to EEOC, even if it has been determined in a workers' compensation claim that the employee has a "permanent disability" or is "totally disabled," an employer may not refuse to return to work an employee with a disability-related occupational injury. This is because workers' compensation laws may have different standards for determining whether a person has a disability and is capable of working.[398] In other guidance, EEOC has stated clearly that the purpose of the ADA differs from the Social Security Act and workers' compensation and, thus, the ADA's definition of "qualified individual with a disability" is not the same as definitions of disability used in other laws.[399] In particular, the ADA provides for reasonable accommodation in determining whether an individual is able to work. The Social Security Act, on the other hand, is based on a model of disability in which it is assumed that a person with a disability cannot work.[400]

The enforcement guidance on workers' compensation also notes that the employer is responsible for making the decision of whether an employee with a disability-related occupational injury is able to return to work. The employer may seek advice from the employee's rehabilitation counselor, physician, or other specialist on the employee's limitations or need for reasonable accommodation, but those individuals do not make the decision of when the employee is able to return to work. If the employee is able to perform the essential functions of the job, with or without reasonable accommodation, the employee may return to work.[401]

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[394] Direct threat is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (1997).

[395] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," pp. 5–6.

[396] Ibid., p. 7.

[397] Ibid., p. 8.

[398] Ibid., pp. 12–13.

[399] EEOC, "EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a 'Qualified Individual with a Disability' Under the Americans with Disabilities Act of 1990 (ADA)," (EEOC Notice 915.002), Feb. 12, 1997, p. ii (hereafter cited as EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits").

[400] Ibid., p. 8.

Reasonable Accommodation

According to the EEOC guidance, if an employee suffers a disability-related occupational injury and is unable to work temporarily, the employer may not discharge the employee if it would not be an undue hardship to provide leave as a reasonable accommodation. If the employer can demonstrate that holding the position open is an undue hardship, the employer is required to determine if it has an equivalent vacant position to which the employee can be reassigned to continue his or her leave without causing undue hardship. If such a position is not available, the employer must consider vacant positions at a lower level. If there are no vacant positions to which the employee can be reassigned to continue his or her leave without causing undue hardship, continued leave is not considered a reasonable accommodation.[402]

If an employee with a disability-related occupational injury requests leave as a reasonable accommodation, the employer is allowed to provide a different accommodation that will enable the employee to remain on the job. Other reasonable accommodations include reallocation of marginal functions, or, if the employee is unable to perform the essential functions of the position, assignment to another position. The employer is under no obligation to create a new position or remove another employee from his or her position.[403]

If an employee is reassigned as a reasonable accommodation, once the employee is able to perform the essential functions of his or her original position, with or without reasonable accommodation, the employer must restore the employee's original duties. However, the employer may not reassign an employee with a disability-related occupational injury to a different position without first trying to provide a reasonable accommodation for the employee in his or her original position.[404]

The enforcement guidance notes that employees' rights under the ADA are separate from entitlements under workers' compensation laws. Thus, an employer may not place the employer in a workers' compensation vocational rehabilitation program instead of providing a reasonable accommodation.[405] The guidance also states that the employer may make a workplace modification that is not a required form of reasonable accommodation under the ADA if it will offset workers' compensation costs. For example, although the ADA does not require an employer to lower production standards as a reasonable accommodation, the employer may do so if it will enable the employee to return to work more quickly.[406]

Although not mentioned in the EEOC guidance, a clear distinction between the ADA and many workers' compensation laws is the requirement of reasonable accommodation. One author provided the example of New York Workers' Compensation Laws. The State law has been interpreted as allowing the termination of an employee with a disability-related occupational injury who has been absent from work if the termination is consistent with the employer's absenteeism policy.[407] Under the ADA, such a policy would be discriminatory, unless the employer can demonstrate that providing additional leave would cause an undue hardship.

Light Duty

"Light duty" refers to "positions created specifically for the purpose of providing work for employees who are unable to perform some or all of their normal duties."[408] Light duty may take several forms, including less demanding duties, sedentary positions, and removal of demanding duties of the job. The ADA does not prohibit the creation of light duty jobs for employees who are injured on the job. The creation of a light duty position is not required for an employee with a disability who has not suffered an occupational injury, but the employer must provide other forms of accommodation that are available. If an employer has light duty positions that it reserves for employees who are injured on the job, and there is no other way to accommodate an individual with a disability who has not been injured on the job, then the employer must place the employee with a disability in a light duty position, if one is vacant.[409]

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[401] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," pp. 14–15.

[402] Ibid., p. 16.

[403] Ibid., pp. 16–18.

[404] Ibid.

[405] Ibid., p. 18. However, an employer may always provide more than is required as a reasonable accommodation. Thus, the guidance suggests that when an employee is receiving workers' compensation benefits, an employer may have an added incentive to go beyond the ADA. *See* EEOC Comments, p. 16.

[406] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," pp. 19–20.

[407] Deinhardt, "Title I of the ADA and Workers' Compensation," p. 22.

[408] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," p. 20.

Exclusive Remedy Provisions

The EEOC guidance notes that exclusive remedy provisions of workers' compensation laws do not prohibit employees from pursuing claims under the ADA. Exclusive remedy provisions protect employers from being sued under common law theories of personal injury for occupational injury. However, the courts have held that this does not bar claims arising from Federal civil rights laws.[410]

The enforcement guidance, however, does not address the issue of double protection under the laws. Under workers' compensation laws, an outcome may be reached in a "compromise and release" agreement.[411] However, such an agreement does not relieve an employer of its requirements under the ADA, which requires an employer to return an employee with a disability-related occupational injury to work.[412] According to commentators:

> Research has shown that most injured workers who settle their compensation claims spend most of their money within three years of settlement. Many of these individuals are supported eventually by other social systems, such as social security, unemployment insurance, and even public welfare. Even though *double protection* may be frightening to some employers, its effect may help employers to save money and employees to save their jobs.[413]

Another commentator has noted that this "seeming conflict" between the two statutes can be resolved. Exclusive remedy procedures apply to civil actions against an employer for occupational injuries. A discrimination charge is not inconsistent with this provision because it is not seeking additional relief for the injury; it is seeking relief for the employer's failure to comply with title I. According to this commentator, "[a]n injured worker not allowed to return to work because of discrimination based on race or sex could similarly receive damages for such discrimination in addition to workers' compensation."[414]

Other Issues

Overall, this enforcement guidance provides clear analysis and valuable information on disability claims deriving from work-related injuries. Written mainly for EEOC investigative staff, its simple, direct language makes it accessible to a variety of stakeholders, especially employers and individuals with disabilities themselves.

With respect to the ADA's relationship to State workers' compensation laws, among the issues of concern[415] is a need for integrating companies' ADA policies and procedures and the workers' compensation process. Companies' return-to-work policies are designed to be compatible with workers' compensation requirements, and need to be revised in light of the ADA. Also, employers must be aware of when an employee who suffered an occupational injury also is considered to have a disability under the ADA.[416]

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[409] Ibid., pp. 20–23.

[410] Ibid., p. 23.

[411] *See e.g.*, Cal. Labor Code §§ 5000–5001 (West 1989).

[412] Bruce S. Growick and Patrick L. Dunn, "The Americans with Disabilities Act and Workers' Compensation: Critical Issues and Major Effects," Cornell University, School of Industrial Relations and the National Institute on Disability and Rehabilitation Research, 1995, p. 15.

[413] Ibid., pp. 11–15.

[414] Oliver, "The Impact of Title I of the ADA on Workers' Compensation Law," pp. 370–71.

[415] One commentator has noted that State workers' compensation agencies must educate employers and encourage their compliance with the ADA. Such assistance may result in the accommodation of more employees with disabilities and decreased workers' compensation premium costs. State agencies also could counsel claimants and notify them of their rights under the ADA. Deinhardt, "Title I of the ADA and Workers' Compensation," pp. 24–25. In addition, there are other important measures relating to State workers' compensation laws that could benefit stakeholders. For example, State workers' compensation systems could require physicians to provide more detail on the nature of a claimant's disability so that employers would be aware of the work restrictions of an employee with a disability-related occupational injury. This information would allow the employer to plan more appropriately for a reasonable accommodation. Similarly, according to the commentator, rehabilitation professionals could provide information on the types of accommodations that are required. Ibid., p. 25.

EEOC has not addressed in its enforcement guidance the issue of how the ADA and workers' compensation laws interact. However, its *Technical Assistance Manual* provides important information on the relationship between workers' compensation laws and the ADA not in the enforcement guidance. The manual provides a brief description of State second injury funds and states that employers are not prohibited from providing information to second injury funds, as required by State workers' compensation laws.[417]

Applications for Benefits and "Qualified Individual with a Disability"

In February 1997, EEOC released enforcement guidance addressing the effect of representations made in applications for disability benefits on the determination of whether a person is a "qualified individual with a disability" under the ADA.[418] The guidance takes the position that representations about the ability to work made when applying for social security, workers' compensation, disability insurance, and other disability benefits should not bar an individual from filing an ADA charge. This guidance provides specific instructions for EEOC investigators working on cases involving this kind of situation.[419]

EEOC issued the guidance in response to a trend in the courts to bar ADA claims by plaintiffs who had previously applied for disability benefits such as social security or workers' compensation benefits.[420] This bar to a claim is referred to as judicial estoppel.[421] ADA claims based on judicial estoppel have turned on the issue of whether an individual who has made a sworn statement that he or she was permanently and totally disabled under a disability benefits plan can legally claim that he or she is a "qualified individual with a disability" under the ADA.[422] One court that disagrees with EEOC on

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[416] Richard K. Pimentel and others, *The Workers' Compensation-ADA Connection: Supervisory Tools for Workers' Compensation Cost Containment That Reduce ADA Liability* (Chatsworth, CA: Milt Wright & Associates, Inc., 1993), p. 15.

[417] EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, (EEOC–M–1A), January 1992, p. IX–6 (hereafter cited as EEOC, *ADA Technical Assistance Manual*).

[418] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits."

[419] According to EEOC, a "qualified individual with a disability" is "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position...and who, with or without reasonable accommodation, can perform the essential functions of [the] position." Ibid., p. i.

[420] *See* August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992); Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963 (E.DN.C. 1994). The courts are not consistent on this issue, and critics are concerned with the uneven treatment of ADA cases by the courts: "The most distinct and disconcerting trend that has emerged in Title I employment litigation is the summary dismissal of ADA claims where the individual has also applied for, or is in receipt of Social Security Disability Insurance, workers' compensation, benefits under a long term disability policy, or has made a representation in some forum or other venue regarding their ability to work. . . ." Wendy Wilkinson, "Judicially Crafted Barriers to Brining Suit Under the Americans with Disabilities Act," *South Texas Law Review*, vol. 38, p. 912.

[421] Judicial estoppel "is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings." McKinnon v. Blue Cross & Blue Shield of Ala., 935 F.2d 1187, 1192 (11th Cir.1991) (quoting American Nat'l Bank v. Federal Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir.1983)).

Judicial estoppel may be defined as a legal term that generally refers to preventing a party from arguing a point when such an argument would contradict a statement or legal argument made in an earlier legal proceeding. Essentially, estoppel is used to preclude a second action when an identical issue has been decided in another proceeding. In ADA cases, judicial estoppel is often applied when a plaintiff has filed for workers' compensation, social security, or other disability-related benefits. Anne E. Beaumont, "This Judicial Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act," *New York University Law Review*, vol. 71, p.1551 (hereafter cited as, Beaumont, "This Judicial Estoppel Has Got to Stop"), citing to Black's Law Dictionary 551–52 (6th ed. 1990). According to Wilkinson, the forms of estoppel used in ADA cases most closely resemble issue preclusion, judicial estoppel, estoppel in pais, estoppel by inconsistent positions, and equitable estoppel. Wilkinson, "Judicially Crafter Barriers to Bringing Suit Under the ADA").

[422] *See* Marney Sue Collins, "Comment: Estop It! Judicial Estoppel and its Use in Americans with Disabilities Act Litigation," *Houston Law Review*, vol. 34 (Fall 1997), p. 843 (explaining that "[a]ccording to the proponents of the argument, the ADA applies only to qualified individuals with disabilities. In order to be qualified, the plaintiff must be able to perform the essential functions of her job, with or without reasonable accommodation. Proponents argue that

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this issue set forth the opposing view in stark terms when it stated that an ADA claimant receiving disability benefits "simply cannot be disabled, yet claim that he is capable of working."[423] This is the precise conclusion EEOC seeks to refute in this guidance.

As of mid-1998, the Supreme Court had not become involved in the continuing controversy over whether or not judicial estoppel can be applied in instances where a person with a disability has both filed for disability benefits and brought an ADA suit against an employer. The Court could resolve this issue. According to one commentator: "The concept of judicial estoppel has some superficial logical appeal. However, it absolves courts of the obligation to engage in thorough statutory interpretation, and it perpetuates negative stereotypes about the ability of people with disabilities to participate in the workplace."[424]

EEOC advances legal and public policy arguments to support its position that the application of judicial estoppel in this context wrongly interprets the ADA and thwarts its purposes. In making these arguments, the guidance relies on a comparison demonstrating the differences between the purposes and standards of the ADA and those of the various disability benefit schemes. Essentially, EEOC bases its legal argument on the following proposition: because the purposes of the laws and the standards set forth in law and regulations for designated disability are different, being designated as permanently or totally disabled for the purposes of receiving benefits does not preclude ability to work under the ADA.[425] These differences serve as EEOC's rationale for why courts' application of the judicial estoppel bar in this context is based on flawed reasoning. EEOC's public policy argument in this guidance derives from concerns quite similar to those made in the following statements:

> judicial estoppel forces the individual with a disability to waive rights she does not even know she might need to enforce. The threat of judicial estoppel of a possible, future ADA claim renders it nearly impossible for an individual with a disability who needs immediate income support, but who also might have a future ADA claim—including a claim based on a discriminatory act that has not yet occurred—to make an intelligent choice about how to proceed at the onset of her disability.[426]

EEOC supports its arguments with a thorough analysis that incorporates the relevant caselaw. It also makes excellent use of hypothetical examples to illustrate its key points. Overall, the document's discussion of the judicial estoppel issue presents one of EEOC's most in-depth and detailed statements clarifying the purposes and goals of the ADA that the agency has produced to date. The guidance's legal analysis demonstrates common sense logic, thoughtful insight, and consistency with the purposes of the ADA.

Introduction—Judicial Estoppel

The guidance opens by reiterating the language of the ADA statute and EEOC's title I regulations, which state that, to be protected under the ADA, an individual must be a "qualified individual with a disability."[427] The term "qualified individual with a disability" is crucial to this discussion, because in ADA cases in which the judicial estoppel analysis has been applied, the claimant previously has filed for disability benefits and represented that he or she met the relevant eligibility requirements of such plans, or, in other words, that he or she was "totally disabled," or "unable to work." The judi-

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when a plaintiff asserts that she is totally disabled for disability benefit purposes, the plaintiff is no longer a qualified individual under the ADA. Because being qualified is an element of an ADA cause of action, the employers argue that the plaintiffs are unable to prevail on their ADA claims as a matter of law." Ibid., pp. 844–45) (citations omitted).

[423] Shaheen v. Amsted Industries, Inc., 1997 U.S. App. LEXIS 35312 (6th Cir. 1997).

[424] Beaumont, "This Judicial Estoppel Has Got to Stop," p. 1577.

[425] EEOC, "Enforcement Guidance: Workers' Compensation and the ADA," p. 13.

[426] Beaumont, "This Judicial Estoppel Has Got to Stop," p. 1572.

[427] Because the term "qualified individual with a disability," plays a key role in addressing the judicial estoppel issue, EEOC introduces this enforcement guidance with the definition of this term. The guidance states that a "qualified individual with a disability" is "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 1.

cial estoppel issue has arisen, for example, where courts have found that statements made on applications for social security benefits to the effect that the plaintiff is unable to work create a presumption that the plaintiff must rebut in order to show that he or she is qualified to work.[428]

EEOC, however, disagrees with this interpretation of the law. EEOC states that its position is that representations made in connection with an application for disability benefits should not be an automatic bar to an ADA claim.[429] A majority of courts agree with EEOC's interpretation.[430] For instance, in *Griffith v. Wal-Mart Stores, Inc.*, the Sixth Circuit found that statements made in an application for social security disability benefits, while relevant, do not require application of judicial estoppel, in part because such applications give no consideration to an individual's ability to work with reasonable accommodation, which is required under the ADA.[431] In *Talavera v. School Board of Palm Beach County*, the Eleventh Circuit reversed a district court's finding that an ADA plaintiff who has claimed total disability on a benefits application is *per se* estopped from claiming she could work with reasonable accommodation, because the Social Security Administration, in determining "disability," does not take into account the potential effect of reasonable accommodation on the claimant's ability to work.[432] In another case, *Smith v. Dovenmuehle Mortgage Inc.*, a district court held that the plaintiff was not judicially estopped from arguing that he was qualified under the ADA based on the reasoning that to hold otherwise would put the plaintiff "in the untenable position" of having to choose between his right to seek disability benefits and his right to seek redress for a possible violation of the ADA and that judicial estoppel would frustrate the ADA's purpose of combating discrimination against people with disabilities.[433]

Other courts, however, are interpreting the law based on a judicial estoppel analysis.[434] For instance, the Sixth Circuit, in *Shaheen v. Amsted Industries, Inc.*, found judicial estoppel the appropriate analysis to employ where claimant continues to receive disability disabilities benefits and seeks reinstatement under ADA.[435] In *McNemar v. Disney Store*, the Third Circuit held that an HIV-positive store manager who had stated on applications for disability benefits that he was totally and permanently disabled and unable to work was judicially estopped from claiming he was a qualified individual under the ADA.[436]

EEOC states that it has five purposes with this guidance. The first is to analyze the differences between ADA's purposes and standards and those of other disability benefit programs.[437] The second is to discuss and analyze recent and significant court decisions that have addressed the judicial estoppel issue.[438] The third is to explain why judicial estoppel should not be used to bar ADA claims of individuals who also have applied for disability benefits.[439] The fourth purpose is to explain why EEOC's position on this issue is supported by public policy.[440] Finally, EEOC seeks to provide guidance to investigative staff in assessing what weight, if any, to give to representations made in applications for disability benefits in determining if an ADA claimant is a "qualified individual with a disability" for purposes of the ADA.

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[428] *See, e.g.*, McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 562–563,1998 U.S. App. LEXIS 1058, *10 (5th Cir., 1998) (holding that statements on a social security benefits application created a presumption that plaintiff was not a qualified person with a disability and that plaintiff provided no evidence to rebut this presumption); *see also* Shaheen v. Amsted Industries, Inc., 1997 U.S. App. LEXIS 35312, *3 (6th Cir. 1997) (finding that judicial estoppel was the appropriate analysis to employ where claimant continued to receive disability benefits while seeking reinstatement under ADA).

[429] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. i.

[430] *See, e.g.* McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 7 1164 (7th Cir. 1997) (finding that statements certified to the Social Security Administration claiming inability to work do not bar ADA claims because Social Security Administration definition of disability differs from that of the ADA, making disability benefits application statements inconclusive in an ADA case); Blanton v. Inco Alloys Int'l, 123 F.3d 916, 917 (6th Cir. 1997) (finding that receipt of social security benefits does not automatically estop an ADA plaintiff from claiming he could perform his job, although it is a factor to consider); Weigel v. Target Stores, 122 F.3d 461, 466–67 (7th Cir. 1997) (holding that because the Social Security Administration's definition of disability, as well as those of most disability insurance plans, differs materially from the ADA's definition of a "qualified individual with a disability," these representations are not conclusive as to the ADA). Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (a determination of disability for Social Security Act purposes cannot be construed as a judgment that an individual cannot do a particular job).

[431] Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376 (6th Cir. 1998).

[432] Talavera v. School Bd. of Palm Beach County, 129 F.3d 1214, 1220 (11th Cir. 1997).

[433] Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1141–43 (N.D. Ill. 1994).

[434] *See, e.g.*, McConathy v. Dr. Pepper/Seven Up Corp., 1998 U.S. App. LEXIS 1058, *10 (5th Cir., 1998) (holding that statements on a Social Security benefits application created a presumption that plaintiff was not a qualified person with a disability and she provided no evidence to rebut this presumption); August v. Offices Unlimited, Inc., 981 F.2d 576, 583–84 (1st Cir. 1992) (treating the plaintiff's statements regarding disability to insurance carriers as binding admissions).

[435] 1997 U.S. App. LEXIS 35312, *3 (6th Cir. 1997).

[436] McNemar v. Disney Store, 91 F.3d 610, 619–21 (3rd Cir. 1996), cert. denied, 117 S. Ct. 958 (1997). However, according to a Senior EEOC Attorney, after EEOC issued its policy guidance on the issue, the Third Circuit has called into question the *McNemar* decision. *See* NIDRR ADA Technical Assistance Program Project Directors' Meeting, Feb. 24–25, 1998, summary (OCRE files), statement of Sharon Rennert, p. 4.

EEOC's Analysis

Fundamentally Different Purposes and Standards in ADA

The guidance opens its argument by stating that the ADA's definitions of the terms "disability" and "qualified individual with a disability" are "tailored to the broad remedial" purposes of the statute," including the elimination of barriers preventing individuals with disabilities from gaining access to the mainstream of American life, equal employment, and other opportunities.[441] As a result, the definitions of "disability" and "qualified individual with a disability" under the ADA differ from the definitions of the same or similar terms in the Social Security Act, State workers' compensation laws, disability insurance plans, and other disability benefits programs. Terms in these laws are tailored to their specific purposes just as terms in the ADA are tailored to its purposes.

The fundamentally different purposes of these laws are a key element of the guidance's argument that representations made by an individual in applying for disability benefits should not bar him or her from bringing an ADA claim. In advancing this argument, the guidance relies on several specific ways in which the ADA's requirement of a "qualified individual with a disability" differs from requirements of disability benefit schemes. First, the guidance notes, the ADA is based on the fundamental principle "that individuals who want to work and are qualified to work must have an equal opportunity to work," and the requirement for a "qualified individual with a disability" reflects this principle.[442] Second, the "qualified individual with a disability" requirement focuses on what an individual can do, as opposed to what he or she cannot do, which is the focus of the disability benefit schemes.[443] Third, a determination of whether an individual is a "qualified individual with a disability" requires an individualized assessment of a person's abilities, as opposed to an evaluation of general or group characteristics.[444] Finally, the 'qualified individual with a disability" requirement "looks at whether an individual with a disability is qualified for the specific position at issue, not at whether s/he is qualified for work in general."[445]

Determining if an individual is a "qualified individual with a disability" under the ADA must be made in keeping with these principles. This determination requires two steps: the first is to determine if the individual has the "education, training, skills, experience, and other job-related credentials for the position";[446] the second step is to determine if the individual can perform the essential functions of the job with or without reasonable accommodation. The guidance reiterates the principles on which this determination must be based, e.g., an individualized, case-by-case assessment of the specific abilities of the person and a focus on "whether a particular individual with a disability is qualified for a particular position, not whether the individual or a group of individuals with a disability is qualified for a class of positions."[447]

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[437] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 2.

[438] Ibid.

[439] Ibid.

[440] Ibid., p. 3.

[441] Ibid.

[442] Ibid., pp. 4–5 (citing 42 U.S.C. § 12101(a) (9) (1994) (noting that discrimination "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.")).

[443] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 5 (citing 135 CONG. REC. S10,711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin)).

[444] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 5 (citing 42 U.S.C. § 12101(a) (7) (1994) (denouncing "stereotypic assumptions not truly indicative of the *individual ability* of [people with disabilities] to participate in, and contribute to, society") (emphasis added)).

[445] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 5

[446] Ibid., p. 6.

The guidance contrasts the purposes and standards of the ADA with those of social security, workers' compensation, and disability insurance.[448] Each discussion shows clear contrasts between the purposes and standards of the various disability benefits plans and those of the ADA. For example, the guidance contrasts the ADA with the Social Security Act (SSA)[449] by noting that the latter "establishes a social insurance program designed to provide guaranteed income to individuals with disabilities when they are found to be generally incapable of gainful employment."[450] The guidance further notes that, in contrast to the ADA's definitions of "disability" and "qualified individual with a disability":

> The SSA definition of the term "disability," . . . reflects the obligation to provide benefits to people who generally are unable to work. As a result, the definition focuses on what a person cannot do and on whether s/he cannot find work in the national economy in general.[451]

Workers' compensation laws also differ significantly from the ADA—for example, they are based on general classifications of disability and ability to work.[452] Disability insurance, the guidance observes, is meant to provide partial wage replacement to employees whose health conditions prevent them from working.[453] As a result, just as with SSA and workers' compensation laws, disability insurance plans focus on what a person with a disability cannot do rather than on what he or she can do.[454]

In determining eligibility for benefits, the guidance explains, an essential requirement under the SSA is that the claimant must be unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[455] This standard is substantially different from that of the ADA in the way it describes work and the way it describes disability.

The next important difference is that the ADA focuses on an individualized assessment of a person's ability to work, while the SSA relies on a general profile.[456] The guidance further notes that the ADA distinguishes between essential and nonessential functions in determining whether an individual with a disability is qualified to work.[457] The SSA does not make this distinction, so someone who can perform essential but not all job functions may be disabled under SSA while the same individual would be a qualified individual with a disability under the ADA.[458] Finally, the guidance notes that the ADA determination is based on a consideration of whether an individual can perform essential job functions if provided with reasonable accommodation.[459] The SSA system does not consider reasonable accommodation in making its determination as to ability to work.[460]

The SSA regulations explicitly recognize that its determinations are based on social security law and that, as the guidance notes, "a decision by any other entity about whether an individual is disabled is based on the entity's rules and may not be the same as the SSA's determination."[461]

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[447] Ibid. (citing 29 C.F.R. pt. 1630 app. (noting in "Background" section that "the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis" and that a "case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs.")).

[448] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 7.

[449] *See generally*, 42 U.S.C. §§ 301–1397f (1994).

[450] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 8.

[451] Ibid.

[452] Workers' compensation laws typically provide the following four classifications of disability: temporary partial, temporary total, permanent partial, and permanent total. Ibid., p. 14.

[453] Ibid., p. 16.

[454] Ibid.

[455] Ibid., p. 8 (citing 42 U.S.C. § 423(d) (1) (A) (1994); 20 C.F.R. § 404.1505 (1997)).

[456] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 11 (stating "whereas the ADA always requires an individualized inquiry into the ability of a particular person to meet the requirements of a particular position, the SSA permits general presumptions about an individual's ability to work.").

[457] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 11–12.

[458] Ibid., p. 12.

[459] Ibid. (stating: "the definition of the term 'qualified individual with a disability' expressly requires consideration of whether the individual can perform essential functions with reasonable accommodation.") *See* 42 U.S.C. §§ 12111(8) (1994) (citation added).

[460] *See generally* 42 U.S.C. §§ 423(d), 1381–1383 (1994).

In the section of the guidance discussing the SSA program, EEOC also argues that courts are wrongly applying the judicial estoppel analysis by explaining that although the SSA program is based on serving people with disabilities who are deemed unable to work, even the SSA recognizes that an individual may be found unable to work under its definition but still be capable of working in a particular position. The guidance explains that although the SSA program is designed to provide a guaranteed income to people who meet its eligibility requirements, it has work incentives built into it. For example, the SSA has a trial work period that allows beneficiaries to work for 9 months while still receiving benefits.[462]

EEOC provides hypothetical examples in illustration and cites caselaw to support its position. The first example involves an individual whose disability is the loss of both hands and feet. The listed impairments in SSA's regulations include the loss of both hands and feet in its musculoskeletal category of impairment. Because this is a listed impairment, an individual who has lost both hands and feet may be presumed unable to work for purposes of SSA's disability benefits determination. However, under the ADA, the same individual can be a "qualified individual with a disability" who is capable of working and performing the essential functions of a job with or without reasonable accommodation.[463]

The second hypothetical example involves an individual who is blind. Under the SSA, any claimant over 55 with a visual impairment that meets the statutory definition of blindness is presumed to be incapable of "substantial gainful activity" and deemed eligible of SSA disability benefits. There are a number of reasons why this individual might be considered qualified to work under the ADA. First, the SSA, unlike the ADA, does not consider whether there is a reasonable accommodation that might allow this individual to perform the essential functions of a particular job. Second, there are no statutory definitions of disabilities under the ADA that presume an individual incapable of working.[464]

The guidance notes several cases that support EEOC's position. For instance, in *Overton v. Reilly*,[465] the Seventh Circuit held that a determination of disability for purposes of SSA cannot be construed to mean that an individual cannot do a particular job. Another case the guidance cites is *Eback v. Chater*,[466] in which the Eighth Circuit stated that SSA's determination as to whether an individual can engage in "substantial gainful activity" is a generalized one and not based on an individualized assessment of the requirements or accommodations of a particular job.[467]

The guidance's discussion of workers' compensation and disability insurance plans points out the differences from the ADA. For example, workers' compensation laws focus on lost earning capacity, and on what the worker "can no longer do rather than on what s/he still is capable of doing with or without reasonable accommodation."[468] Also, in determining disability, workers' compensation laws do not distinguish between essential and nonessential job duties; nor do they consider reasonable accommodation. As a result, "a person may be 'totally disabled' for workers' compensation purposes and yet still be able to perform a position's essential functions with or without reasonable accommodation."[469] Like the other disability benefits plans, disability insurance plans often do not distinguish between essential and nonessential job functions;[470] and they "frequently do not make allowance for an individual's ability to work with reasonable accommodation."[471]

EEOC's subsequent legal analysis has two parts. The first is a section on how the ADA definition of "qualified individual with a disability" always requires an individualized assessment under the ADA, whereas the three other schemes, SSA, workers' compensation, and disability insurance plans, permit generalized inquires and presumptions.[472] The second part of the analysis discusses how the ADA definition of "qualified individual with a disability" requires consideration of reasonable accommodation whereas in the other schemes, the equivalent definition of disability does not.[473]

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[461] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 11 (citing 20 C.F.R. § 404.1504 (1997)).

[462] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 9 (citing 20 C.F.R. § 404.1592(a) (1997)).

[463] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 11, n. 41.

[464] Ibid., pp. 11–12, n. 41.

[465] 977 F.2d 1190, 1196 (7th Cir. 1992).

[466] 94 F.3d 410 (8th Cir. 1996).

[467] *Id.* at 412.

[468] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 13–16.

[469] Ibid., p. 15.

[470] Ibid., pp. 16–17.

[471] Ibid., p. 17.

The analysis opens by stating the proposition developed in the earlier sections, namely, that "an individual may be 'unable to work' for purposes of a disability benefits program and yet still be able to perform the essential functions of a particular position with or without reasonable accommodation."[474] The guidance supports this statement with precedent in the caselaw.[475] For example, the guidance notes a case, *Robinson v. Neodata Services, Inc.*,[476] in which the Eighth Circuit found that SSA determinations of disability "are not synonymous with a determination of whether a plaintiff is a 'qualified' person for purposes of the ADA." In another case cited in the guidance, a court found that a finding by a State workers' compensation commission or the SSA does not automatically foreclose an ADA claim.[477]

In the analysis of the ADA's requirement of an individualized assessment in determining whether someone is a "qualified individual with a disability," the guidance states that unlike the various disability benefit schemes, the ADA never presumes that some impairments are so severe as to prevent an individual from working. In fact, the ADA presumes the opposite, that individuals with disabilities can work.[478] The guidance cites numerous cases in which courts have agreed that the ADA's requirement of an individualized assessment in determining disability and ability to work is a fundamental difference between the ADA and the various disability benefits programs, which rely on generalized classifications.[479]

This part of the analysis also addresses *McNemar v. The Disney Store, Inc.*,[480] a case that disagrees with EEOC on the judicial estoppel issue. The *McNemar* court rejected the argument that because ADA's purposes and standards are fundamentally different from those of the SSA's, their conclusions as to qualifications and ability to work may differ significantly. The guidance states that the *McNemar* court wrongly decided the case because it had "overlooked the fact that 'unable to work' for SSA purposes does not mean unable to perform the essential functions of a particular position with or without reasonable accommodation."[481]

In the second part of its analysis, the guidance emphasizes that the ADA, unlike the various disability benefits plans, requires an assessment as to whether an individual can work with a reasonable accommodation. In this discussion, the guidance further develops its argument with case precedent. For example, the guidance cites the case of *D'Aprile v. Fleet Services Corporation*,[482] in which the court found that an application for disability benefits "sheds no light" on how the plaintiff would have fared had the reasonable accommodation she had requested been made.[483] Like *D'Aprile*, the cases discussed in this part of the analysis stand for the proposition that receipt of disability benefits does not show that an individual is totally unable to work, because disability benefit plan applications do not consider whether the person could work with a reasonable accommodation.[484] In concluding this analysis, the guidance states that the cases discussed demonstrate that "an individual can meet the eligibility requirements for disability benefits and still be able to perform the essential functions of particular positions with reasonable accommodation."[485]

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[472] *See* ibid., pp. 18–19.

[473] *See* ibid., pp. 19–23.

[474] Ibid., p. 18.

[475] Ibid. (citing Robinson v. Neodata Services, Inc., 94 F.3d 499, 502 n.2 (8th Cir. 1996); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992); Pegues v. Emerson Electric Co., 913 F. Supp. 976, 980 (N.D. Miss. 1996); Palmer v. Circuit Court of Cook County, 905 F. Supp 499, 508 n.10 (N.D. Ill. 1995), *cert. denied,* 118 S. Ct. 893 (1998) ; Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1141–43 (N.D. Ill. 1994)).

[476] 94 F.3d at 502 n.2.

[477] Pegues, 913 F. Supp. at 980. The court in *Pegues* noted, however, that the substance of plaintiff's testimony and representations made in the workers' compensation and social security administration proceedings and their subsequent findings "trouble this court and pose the greatest hurdle for [plaintiff]." The court found against the plaintiff.

[478] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 19.

[479] Ibid., pp. 20–22 (citing Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992); Smith v. Dovenmuehle Mortgage, Inc. 859 F. Supp. 1138, 1141 (N.D. Ill. 1994); Daffron v. McDonnell Douglas Corp., 874 S.W. 2d 482, 486 (Mo. Ct. App. 1994)).

[480] 91 F.3d 610 (3rd Cir. 1996) *cert. denied,* 117 S. Ct. 958 (1997).

[481] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 21–22.

[482] 92 F.3d 1 (1st Cir. 1996).

[483] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 24 (citing 92 F.3d 1, 5 (1st Cir. 1996)).

Role of Representations Made in Applications for Disability Benefits

The second section of the guidance sets forth EEOC's position that judicial estoppel should not be used as a bar to an ADA claim where the claimant has made previous representations on applications for disability benefits.[486] The guidance addresses the doctrine of judicial estoppel and the role of summary judgment in cases involving ADA claimants who previously have applied for disability benefits.[487] EEOC sets out several reasons why courts should not invoke judicial estoppel to bar ADA claims. First, an individual who claims that he or she is both "totally disabled" and a "qualified individual with a disability" has not necessarily made inconsistent statements.[488] Second, the guidance notes that the doctrine of judicial estoppel generally has applied only when an individual made his or her earlier inconsistent statement in a prior *judicial proceeding*. However, applications for disability benefits are made as part of an administrative determination, a wholly different process. The guidance observes "[a]ccordingly, courts that have recognized the significant differences in judicial proceedings and administrative determinations have declined to apply judicial estoppel to bar claims of disability discrimination."[489] A third argument is that several circuits have refused to recognize the doctrine of judicial estoppel, so it has not been universally accepted as a legitimate legal theory.[490]

The guidance argues that summary judgment, a judicial determination of whether a trial is necessary, should not be granted to ADA defendants on the basis that the claimant previously has filed an application for disability benefits. In this discussion, the guidance notes that a court only will grant summary judgment where it determines that there is no genuine issue of material fact.[491] The guidance argues that because an individual's representations on an application for disability benefits do not mean that he or she is incapable of performing essential functions of a job with reasonable accommodation, the application for disability benefits does not mean that there is no question as to whether the individual is a "qualified individual with a disability."[492]

The guidance notes that some weight may be given to representations made on disability benefits applications in determining whether an individual is a "qualified individual with a disability." Context and timing are the criteria for deciding how much weight is allowed. For context, the guidance states that representations made on disability benefits applications should not be viewed in a vacuum, but rather in the context of all other relevant documents and the conditions under which the individual applied for the benefits.[493] For example, the guidance cites cases where individuals who applied for disability had done so only after their employers had refused to provide reasonable accommodation.[494] Timing can be important because individuals who apply for disability benefits may become rehabilitated and capable of rejoining the workplace. The guidance provides several cases where courts have relied on the timing of the application to determine that it had no relevance to the plaintiff's current ADA suit. For example, in *Smith v. Dovenmuehle Mortgage Co.*,[495] the plaintiff, who had AIDS, claimed that his condition was improved and that he was strong enough to return to work 1 month after leaving on disability. The court found that because his condition had improved, his statements on his disability benefits application were not inconsistent with his current ADA claim.[496] In another case, *Lawrence v. United States I.C.C.*,[497] the court found that since 22 months had passed since the plaintiff's application for SSA benefits and the filing of his ADA claim, his contention that he was now able to work did not necessarily contradict his earlier statement.[498]

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[484] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 23–26 (citing Eback v. Chater, 94 F.3d 410, 412 (8th Cir. 1996); D'Aprile v. Fleet Services Corp., 92 F.3d 1 (1st Cir. 1996); Kennedy v. Applause, 90 F.3d 1477 (9th Cir. 1996); Ward v. Westvaco Corp., 859 F. Supp. 608, 615 (D.Mass. 1994)).

[485] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 26.

[486] Ibid., p. 28.

[487] Ibid.

[488] Ibid. (citing Smith v. Dovenmuehle Mortgage Co., 859 F. Supp. 1138 (N.D. Ill. 1994)).

[489] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 28 (citing Mohamed v. Marriott, 944 F.Supp. 277, 283–84 (S.D.N.Y., 1996)).

[490] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 27 citing United Mine Workers of America 1974 Pension v. Pittston Co., 984 F.2d 469, 477 (D.C. Cir.), *cert. denied,* 509 U.S. 924 (1993); Chrysler Credit Corp. v. County Chrysler Inc., 928 F.2d 1509, 1520 n.10 (10th Cir. 1991)).

[491] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 29 (citing Fed. R. Civ. P. 56(c)).

[492] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 30.

[493] Ibid., p. 31.

Overall, courts disagreeing with EEOC's position in this guidance are retreating from their earlier interpretations of ADA.[499] Currently, at least two of the Federal circuits agree with EEOC's position on the judicial estoppel issue.[500] One dramatic shift on this issue has been a recent decision of the Fifth Circuit. In the case of *Cleveland v. Policy Management Systems*,[501] the Fifth Circuit held that representations made by an ADA claimant on an application for Social Security benefits raises only a presumption that the plaintiff was not qualified to perform a job under that statute's terms.[502]

Part of the reason for this change may be EEOC's enforcement guidance on the issue.[503] The agency's own retreat from its earlier position may have helped. Originally, the agency viewed statements on disability benefit applications as completely irrelevant in determining whether an ADA claimant was a qualified individual with a disability.[504] The guidance, however, takes a more moderate approach in which it considers such statements potentially relevant, taking context and timing into account.[505]

Public Policy Reasons Supporting Conclusion

The guidance makes a public policy argument to support its conclusion that representations made in connection with an application for disability benefits never should be an automatic bar to an ADA claim. This policy discussion has two main points: first, allowing individuals to go forward with their ADA claims is critical to the ADA's goal of eradicating discrimination against people with disabilities; and second, individuals should not have to choose between applying for disability benefits and vindicating their rights under the ADA.[506] The guidance states that barring individuals who apply for disability benefits from pursuing ADA claims would "impede EEOC's enforcement of the ADA and deny individuals the right to have the court hear the merits of their claims."[507] The guidance adds "it also would permit the continuation of the invidious discrimination that the ADA is designed to eradicate."[508]

The discussion marshals U.S. Supreme Court precedent in arguing against the use of judicial estoppel in ADA cases where the plaintiff previously has applied for disability benefits. The guidance cites *McKennon v. Nashville Banner Publishing Co.*,[509] in which the Court stated equitable doctrines, which is what judicial estoppel is, should not be used as absolute bars to suits brought under Federal antidiscrimination legislation because of the important public purposes furthered by such legislation.[510] This statement supports the guidance's conclusion that "if an individual is prevented from bringing an ADA claim because s/he has applied for disability benefits, discrimination is not deterred and the plaintiff's interests are not vindicated."[511]

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[494] Ibid., p. 32 (citing Anzalone v. Allstate Ins. Co., 1995 U.S. Dist. LEXIS 1272 (E.D. La. 1996), *aff'd*, 74 F.3d 1236 (5th Cir. 1995); Ward v. Westvaco Corp., 859 F. Supp. 608, 614–15 (D. Mass 1994).

[495] 859 F. Supp. 1138 (N.D. Ill. 1994).

[496] *Id.* at 1142.

[497] 629 F. Supp. 819 (E.D. Pa. 1995).

[498] *Id.* at 822.

[499] *See* David K. Fram, "Expert: More Courts Easing Position on 'Judicial Estoppel,'" *National Disability Law Reporter Highlights*, Oct. 9, 1997, pp. 3–4.

[500] *See, e.g.*, Blanton v. Inco Alloys International, Inc., 123 F.3d 916, 917 (6th Cir. 1997); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992); Weigel v. Target Stores, 122 F.3d 461 (7th Cir. 1997),petition for cert. filed, 66 U.S. L.W. 3435 (U.S. Dec. 15, 1997) (No. 97–1008).

[501] 120 F.3d 513, 518 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3435 (U.S. Dec. 15, 1997) (No. 97–1008).

[502] *Id.* at 518.

[503] *See* Fram, "Expert: More Courts Easing Position on 'Judicial Estoppel,'" pp. 3–4.

[504] Ibid., p. 3.

[505] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 26.

[506] Ibid., pp. 35–37.

[507] Ibid., p. 36.

[508] Ibid.

[509] 513 U.S. 352 (1995).

A second policy argument the guidance makes is that people should not have to choose between applying for disability benefits and claiming their rights under the ADA.[512] All persons have a right to be free from discrimination, and anyone who meets the eligibility requirements of a disability benefit program has the right to receive those benefits.[513] Moreover, it is fundamentally unfair to require people to choose between two independent rights. Persons applying for disability benefits are not knowingly relinquishing their ADA rights.

Instructions to Investigators

The guidance's instructions to EEOC investigative staff reiterate the conclusion that representations made on applications for disability benefits do not bar the filing of an ADA charge. In addition, such representations should not prevent an investigator from recommending a cause determination if the evidence supports it.[514] The guidance reminds investigative staff that in making the "qualified individual with a disability" determination, applying for disability benefits may be relevant, although not dispositive. It is essential to look at all of the relevant evidence.

This section of the guidance should be quite helpful to ADA investigators, because it offers very specific instructions on how to evaluate the relevance of representations made on disability benefits applications to determining whether an individual is a "qualified individual with a disability." The guidance explains that when assessing the effect of representations made on applications for disability benefits on the "qualified individual with a disability" determination, the investigator should focus on "the exact definition used by the benefits program; the precise content of the individuals' representations, and the specific circumstances surrounding the application for benefits."[515] In addition, the guidance states that it is very important to determine whether the individual maintained that he or she could accomplish the essential functions of the job, with or without reasonable accommodation, at the time of his or her application for disability benefits.[516]

The guidance closes with a number of factors for investigators to use in deciding what, if any, weight to give to a charging party's representations made in applying for disability benefits. These include the following:

(1) definitions of terms such as "disability," "permanent disability," and "inability to work";
(2) whether the representations made were in the charging party's own words;
(3) whether the representations made about the charging party's ability to work are qualified in any way;
(4) whether the charging party's physical or mental condition has changed since the representations were made;
(5) whether the charging party was working during a time referred to as a period of total disability;
(6) whether the employer suggested that the charging party seek benefits;
(7) whether the charging party was asked for and denied a reasonable accommodation that would have made it possible for him or her to continue working;
(8) when the employer learned about the representation; and finally,
(9) any other relevant factors, including advances in technology or changes in the employer's operations, that may have occurred since the representations.[517]

Title I of the ADA and Labor Issues

EEOC has set forth its position in policy on several important labor-related issues. EEOC has focused on two areas in particular. The first is the relationship between collective bargaining agreements reached under the National Labor Relations Act (NLRA) and reasonable accommodations required by the ADA.[518] The second is the use of mandatory binding arbitration agreements.[519]

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[510] *Id.* at 358–59.

[511] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 36.

[512] Ibid., p. 37.

[513] Ibid.

[514] Ibid., p. 38.

[515] Ibid.

[516] Ibid.

[517] Ibid., p. 39.

EEOC maintains that, "where there is a conflict between the need for reasonable accommodation and the provision of a collective bargaining agreement, and no other reasonable accommodation exists, the ADA requires the employer and the union to negotiate in good faith a variance to collective bargaining agreement seniority rules in order to provide an accommodation that does not unduly burden non-disabled workers."[520] However, the ADA statute and its legislative history are ambiguous on these issues, making it difficult for EEOC to argue its position in the courts. EEOC has issued one policy statement on arbitration, but only one policy letter offering its position on issues relating to reasonable accommodation and collective bargaining agreements.

Early Attempts to Work with the National Labor Relations Board

Two years after the passage of the ADA, EEOC and the National Labor Relations Board began negotiating a memorandum of understanding (MOU) to resolve potential conflicts between title I of the ADA and the National Labor Relations Act.[521] The negotiations began in late April 1992. Some 4 months later, EEOC's Legal Counsel sent a memorandum to EEOC's Chairman and Commissioners explaining that negotiations between the two agencies had broken down and efforts to reach an agreement had been discontinued.[522]

The main area of conflict between the two agencies involved the role of collective bargaining in the employer's provision of reasonable accommodation. The issues included the extent to which the NLRA requires bargaining with the union in selecting an effective reasonable accommodation; whether an employer violates the NLRA if it negotiates directly with a bargaining unit employee, rather than a union representative, over reasonable accommodation; the limitations, if any, imposed by the confidentiality requirements of the ADA on the duty to furnish information necessary to the union for bargaining; and whether an employer can provide a "mid-term modification" of a collective bargaining agreement without the union's approval.[523] Staff from both agencies met on several occasions to discuss resolution of these issues.

The memorandum explains that NLRB staff informed EEOC staff of certain "limitations" in NLRB policy that would make it difficult to develop an MOU. The first of these limitations was the NLRB General Counsel's policy of submitting issues of first impression to the Board for determination.[524] In addition, the Board itself functions as a quasi-judicial body.[525] As such, the Board decides specific complaints of unfair labor practices submitted to it by the General Counsel.[526] The Board does not act on its own initiative or issue advisory opinions.[527]

The memorandum explains that "[b]ased on these limitations," the NLRB General Counsel declined to make definitive statements as to what actions would or would not constitute violations of the NLRA.[528] In addition, the General Counsel declined to take any position on the provision of reasonable accommodations that would invoke a midterm modification of a collective bargaining agreement.[529] Essentially, the General Counsel informed EEOC that NLRB would not be willing to make unqualified statements in an MOU on which actions would be considered unfair labor practices under the NLRA.[530]

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[518] *See* Thomasina V. Rogers, Legal Counsel, EEOC, memorandum to Evan J. Kemp, Chairman; R. Gaull Silberman, Vice Chairman; Joy Cherian, Commissioner; Tony E. Gallegos, Commissioner; Joyce E. Tucker, Commissioner, re: Status Report on Proposed Memorandum of Understanding with the Office of General Counsel, National Labor Relations Board, Aug. 14, 1992 (hereafter cited as Rogers, memorandum); EEOC, "Memorandum of Understanding Between the General Counsel of the National Relations Board and the Equal Employment Opportunity Commission," Nov. 16, 1993 (hereafter cited as EEOC–NLRB MOU); Ellen J. Vargyas, Legal Counsel, EEOC, letter to Berry Kearney, Associate General Counsel, National Labor Relations Board, re Memorandum of Understanding Between the Equal Employment Opportunity Commission and the National Labor Relations Board, Nov. 1, 1996 (hereafter cited as Vargyas letter).

[519] *See* Rogers, memorandum; EEOC, "Memorandum of Understanding Between the General Counsel of the National Relations Board and the Equal Employment Opportunity Commission," Nov. 16, 1993; Vargyas letter).

[520] *See* EEOC Comments, p. 17.

[521] Rogers, memorandum.

[522] *See* ibid.

[523] Ibid.

[524] Ibid.

[525] Ibid.

[526] Ibid.

[527] Ibid.

[528] Ibid.

[529] Ibid.

The NLRB General Counsel did, however, propose an alternative. Under this proposal, the two agencies would issue an MOU that would contain qualified statements on certain issues concerning what actions the NLRB would consider unfair labor practices under the NLRA.[531] In addition, the MOU would contain a discussion of "procedures to coordinate the issuance of policy and the resolution of charges involving Title I and the enforcement activities of the NLRB General Counsel."[532]

EEOC rejected this proposal because it did not believe such an MOU would provide sufficient guidance to employers, unions, and individuals with disabilities on how to comply with both title I of the ADA and the collective bargaining process required by the NLRA.[533] EEOC proposed instead an MOU that would definitively address those issues for which there was substantial Board precedent on which the General Counsel could base his conclusions.[534] However, the NLRB General Counsel would not agree to make sufficiently definitive statements on any of the issues raised concerning actions that NLRB would or would not consider unfair labor practices under the NLRA. EEOC's Legal Counsel informed EEOC's Commissioners that, as a result of this impasse, "we do not believe that a substantive MOU would serve any useful purpose."[535]

The Legal Counsel further stated that it was important for EEOC to articulate a policy to guide its decisionmaking process on these issues because "[c]overed entities and individuals with disabilities need comprehensive guidance concerning the interplay of accommodation and collective bargaining."[536]

For these reasons, the Legal Counsel informed the Commissioners that her staff had begun work on enforcement guidance on the role of collective bargaining in the provision of a reasonable accommodation required under title I of the ADA.[537] The Legal Counsel explained that "[t]he enforcement guidance will not guarantee that covered entities will be in compliance with the NLRA, since such a guarantee appears impossible, but it will provide guidance on the actions necessary for compliance with the ADA."[538]

NLRB–EEOC Procedural Memorandum of Understanding

The National Labor Relations Board (NLRB) and EEOC entered into a procedural Memorandum of Understanding (MOU) on November 13, 1993.[539] The MOU established procedures for coordinating the enforcement of title I of the ADA and section 8(a)(1) of the National Labor Relations Act.[540]

The memorandum of understanding outlines 10 specific procedures relating to charge filing and processing. The first requires that when a charge is filed with a regional office of NLRB alleging that the duty to bargain under section 8(a)(5), section 8(b)(3) and/or section 8(d) of the NLRA[541] was breached by either an employer or a union, and the resolution of that charge would require an interpretation of the charged party's duties under the ADA, the NLRB General Counsel, will, on completing the investigation, consult with EEOC's Office of Legal Counsel regarding applicability of the ADA.[542] The second procedure is reciprocal and requires that when EEOC has a charge whose resolution would require an interpretation of the NLRA, that EEOC, upon completion of its investigation, consult with the NLRB's Associate General Counsel.[543]

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[530] Ibid.

[531] Ibid.

[532] Ibid.

[533] Ibid.

[534] Ibid.

[535] Ibid. NLRB's Office of General Counsel issued a memorandum to its field personnel addressing potential conflicts between title I of the ADA and the NLRA. In particular, the memorandum discussed unions' duties of fair representation under the NLRA and obligations under the ADA and potential conflicts between the duty to bargain under the NLRA and the duty to comply with the ADA. *See* Jerry M. Hunter, General Counsel, National Labor Relations Board, memorandum to all Regional Directors, Officers-in-Charge, and Resident Officers, re: Potential Conflicts Between Title I of the ADA and the Collective Bargaining Requirements of the NLRA, Aug. 7, 1992.

[536] Rogers memorandum.

[537] Ibid.

[538] Ibid.

[539] NLRB and EEOC, MOU.

[540] *See* 29 U.S.C. § 158(a) (1) (1994). Section 8(a) (1) of the National Labor Relations Act describes unfair labor practices by employers. NLRB and EEOC, MOU.

[541] NLRB and EEOC, MOU. Sections 8(a) (5), 8(b) (3) of the NLRA are found at 19 U.S.C. §§ 158(a) (5), 158(b) (3) and 158(d), respectively.

[542] NLRB and EEOC, MOU.

The MOU requires that EEOC and NLRB share any information relating to the employment policies and practices of a respondent, employer or union, that may assist each agency in carrying out its responsibilities under the agreement.[544] This information might include, but is not limited to, complaints, charges, and investigative files.[545] The MOU requires that when one agency sends information to the other, the receiving agency will observe confidentiality requirements set forth under Federal civil rights law.[546] EEOC agrees to resist any requests for documents shared by NLRB during this process, except for documents already in the public domain, such as pleadings.[547] Consistent with the Freedom of Information Act, NLRB agrees not to produce affidavits or any other nonpublic documents while a case is pending.[548]

The agreement also sets out procedures to be followed if an individual with a disability files a dual complaint with NLRB and EEOC, stating that the collective bargaining representative has failed to fairly represent him or her under the NLRA and, by the same conduct, has violated the ADA.[549] The agreement also states that when an unfair labor practice charge is filed by an individual with a disability alleging that the collective bargaining representative has failed to fairly represent him or her regarding accommodating a disability in the workplace, and the individual has not filed an ADA claim with the EEOC, the NLRB will notify the individual in writing of the right to do so.[550] In addition, the MOU states that the parties to the agreement will engage in "periodic consultations" to review its implementation. Finally, the MOU states that modifications may be made at any time as long as both parties consent and the modification is in writing.

As the 1993 MOU between NLRB and EEOC was limited to procedural matters, a number of important issues were left unresolved. EEOC has taken positions with respect to these in policy guidance and *amicus curiae*.

Conflicts Between the Requirements of the ADA and Labor Practices

Medical Information Confidentiality Requirement

In November 1996, EEOC's Office of Legal Counsel responded to a "request for advice" from NLRB's Region 19/Seattle office pursuant to the 1993 MOU.[551] The issue raised by the Seattle office was whether ADA's prohibition on an employer's supplying an employee's medical information to outside parties means that an employer can refuse to supply a union with medical information that it has requested to process a grievance.[552]

The letter states the facts of the case.[553] The union and the employer are parties to a collective bargaining agreement,[554] which includes the right of individuals to bid for and receive jobs based on seniority, provided they are qualified to perform the job. The employer placed a bid for two jobs. One of the two jobs was filled by the most senior qualified bidder. According to the letter, the other was filled as a reasonable accommodation under the ADA to "John Doe," even though there were more qualified bidders with more seniority.[555]

Soon after the jobs were awarded, the second most senior bidder filed a grievance challenging Doe's selection.[556] The union took the position that the employer had violated the collective bargaining agreement by awarding the job "out of seniority." The employer stated that it awarded the job to Doe because it believed it was required to under the ADA.[557]

The union countered by arguing that the employer could have accommodated Doe in some other way and requested from the employer medical information to use in analyzing the grievance.[558] The employer responded that, after reviewing the collective bargaining agreement and the ADA, it could not release the requested information under the ADA. The union then filed a charge with the NLRB alleging that the employer had violated sections 8(a)(1) and (5) of the NLRA by refusing to provide the union with information needed to process a union grievance.[559]

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[543] Ibid.

[544] Ibid.

[545] Ibid.

[546] Ibid. (citing 42 U.S.C. §§ 2000e–5(b), 2000e–8(e) (1994)).

[547] NLRB and EEOC, MOU.

[548] Ibid.

[549] Ibid.

[550] Ibid.

[551] Vargyas letter.

[552] Ibid., p. 1.

[553] Ibid., pp. 1–2.

[554] Ibid., p. 1.

[555] Ibid.

[556] Ibid., p. 2.

[557] Ibid.

EEOC frames the issue in the case as follows: does the ADA permit an employer to provide medical information about an employee's disability to a union for it to assess a grievance challenging the employer's provision of reasonable accommodation that conflicts with seniority provisions of the collective bargaining agreement?[560] EEOC's position is that because the union, like the employer, is a covered entity under the ADA, it is the union's responsibility to negotiate with the employer to change the collective bargaining agreement, providing there is no other reasonable accommodation and the proposed accommodation would not unduly burden nondisabled workers.[561] EEOC also states that the employer and the union are obligated to negotiate with each other to change the collective bargaining agreement where there is no other accommodation available and the change in the collective bargaining agreement would not provide an undue hardship.[562]

EEOC also stated that medical information may be used to determine reasonable accommodations and an employer may share this information with a third party when necessary to determine a reasonable accommodation.[563] The letter explains that "[i]n the unique setting of the unionized workplace," both the employer and the union are involved in making the reasonable accommodation determination.[564] However, medical information can only be shared on an ad hoc, need to know basis. Under these specific circumstances, the confidentiality provisions of the ADA are not violated.[565]

Reasonable Accommodation and the Collective Bargaining Agreement

A key labor-related issue has been whether the ADA's requirement to provide reasonable accommodation to a qualified individual with a disability should take precedence over the provisions of a collective bargaining agreement between an employer and a union. In cases where a reasonable accommodation has created conflict with a collective bargaining agreement, EEOC has advocated for maintaining the reasonable accommodation at the expense of the collective bargaining agreement. This position is controversial in that it conflicts with the positions of several Federal appeals courts.[566]

EEOC has advanced this position in its policy guidance, such as the policy letter described above, and in *amicus curiae* briefs. For example, EEOC filed an *amicus* brief in *Eckles v. Consolidated Rail Corp.*,[567] a case in which the Seventh Circuit addressed the question of whether reasonable accommodations violate the collectively bargained, bona fide seniority rights of other employees.[568]

In its *amicus* brief in *Eckles*, EEOC stated that the ADA does not require displacement or "bumping" of another employee to accommodate a disabled individual.[569] EEOC stated that it agrees that an individual with a disability is not entitled to an accommodation requiring a change to a collective bargaining agreement if there is an alternative, effective accommodation that could be provided consistent with seniority rules.[570] However, it argues that under the ADA employers and unions have a duty "to negotiate in good faith a variance to. . .seniority rules to provide an accommodation if the proposed accommodation does not unduly burden non-disabled workers."[571] In taking this position, EEOC relies on the legislative history of the ADA.[572] For example, EEOC cites the House Education and Labor Committee report stating that while a collective bargaining agreement may be relevant to a determination of whether a given accommodation is reasonable, "the agreement would not be determinative on the issue."[573]

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[558] Ibid.

[559] Ibid.

[560] Ibid.

[561] Ibid. (citing 42 U.S.C. § 12111(2) (1994); 29 C.F.R. § 1630.2(b) (1997)).

[562] Vargyas letter, p. 2.

[563] Ibid., p. 4.

[564] Ibid.

[565] Ibid.

[566] *See* Kralik v. Durbin, 130 F.3d 76, 83 (3rd Cir. 1997) (even a limited infringement on seniority rights is not reasonable under the ADA); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); *cf.* Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (stating: "we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled."), *cert. denied*, 516 U.S. 1172 (1996); Doe v. Town of Seymour, 1998 U.S. Dist. LEXIS 676, *8 (D. Conn. 1998) (holding reassignment is not a reasonable accommodation when it interferes with seniority provisions of a collective bargaining agreement because it compromises the reasonable expectations of other employees regarding seniority).

[567] 94 F.3d 1041 (7th Cir. 1996), *amended and cert. denied*, 117 S. Ct. 1318 (1997).

[568] *Id. at* 1051.

[569] *See id.* at 1051.

This report also states that conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodation under the ADA "may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation."[574] This language seems to indicate an intent for the provisions of the ADA to outweigh the collective bargaining agreement. Regardless, the ADA's legislative history is at best somewhat ambiguous with respect to this issue.

Nonetheless, EEOC sets forth its position very clearly in its *amicus* briefs such as *Eckles*. EEOC officials have stated publicly the agency's position on the ADA and collective bargaining agreements.[575] However, EEOC has yet to issue a comprehensive policy guidance on this issue.

ADA Claims and Mandatory Arbitration

EEOC has been more active in advancing its position that arbitration proceedings in ADA cases should be voluntary and not mandatory. EEOC has supported this position in a policy statement, *amicus curiae*, and in public remarks made by EEOC officials.[576] Recent court decisions have also agreed with EEOC's position.[577]

In its policy statement on mandatory arbitration, issued July 11, 1997, EEOC states that, as the Federal agency tasked with enforcing and interpreting the Nation's employment discrimination laws, its position is that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws."[578] The policy statement argues that Federal employment discrimination laws "flow directly from core Constitutional principles, and this nation's history testifies to their necessity and profound importance," and the rights bestowed cannot be swept aside by mandatory arbitration.[579] The policy statement points out that arbitration should never be mandatory because the nature of the arbitral process allows—by design—for minimal, if any, public accountability of arbitrators or their decision-making; the public plays no role in an arbitrator's selection—he or she is hired by the private parties to a dispute; the arbitrator's authority is defined and conferred, not by public law, but by private agreement; because decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law; and there is virtually no opportunity for meaningful scrutiny of arbitral decision-making.[580]

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[570] Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae* at 36, *Eckles*, 94 F.3d 1041 (No. 95–2856) (citing 29 C.F.R. Pt. 1630 app. § 1630.9 (1996) (covered entity "has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide")).

[571] *Id.* at 7.

[572] *Id.* at 25 n.15.

[573] H. REP. NO. 101–485(II), at 63 (1990).

[574] *Id.* at 73 (1990).

[575] *See* "Conference Report: EEOC Outlines its Logic; Elsewhere, Agency's Approach Criticized at ABA Meeting," *Americans with Disabilities Act Newsletter (BNA)*, vol. 5, no. 7 (Apr. 11, 1996), p. 43. Addressing attendees of the Great Lakes Disability and Business Technical Assistance Center, EEOC attorney Sharon Rennert discussed the *amicus* brief filed by EEOC in *Eckles v. Consolidated Rail Corp.* Rennert stated that EEOC laid out a two-point position regarding seniority conflict EEOC used in this case. First, an alternative that does not conflict should be sought. If that fails, the union and management must negotiate to find an accommodation that does not unfairly burden any nondisabled employee. *See* Rennert interview.

See also "EEOC Officials Discuss 'Mitigating Measures,' Accommodation, Arbitration at PCEPD Conference," *Americans with Disabilities Act Newsletter (BNA)*, vol. 6, no. 11 (June 12, 1997), p. 65 (hereafter cited as "EEOC Officials Discuss"). Speaking June 4, 1997, at the 50th annual conference of the President's Committee on Employment of People with Disabilities, Peggy Mastroianni, Associate Legal Counsel at EEOC, said that although in situations where there is a collective bargaining agreement, courts generally have said that the bargaining agreement "trumps" the ADA in reasonable accommodation disputes, EEOC disagrees with this position and will continue to argue against it.

[576] *See, e.g.*, Paul Steven Miller, Commissioner, EEOC, interview in Washington, DC, Apr. 1, 1998, p. 2; Reginald E. Jones, Commissioner, EEOC, interview in Washington, DC, Apr. 2, 1998, pp. 3–4.

[577] *See* Gibson v. Neighborhood Health Clinics Inc., 121 F.3d 1126 (7th Cir. 1997); Brisentine v. Stone & Webster Engineering Corp., 117 F.3d 519 (11th Cir. 1997); Nelson v. Cyprus Bagdad Copper Corp., 119 F. 3d 756 (9th 1997), *petition for cert. filed*, Jan. 5, 1998.

[578] EEOC, "Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment," July 11, 1997.

[579] Ibid.

Several recent court decisions have supported EEOC in its position on mandatory arbitration. For example, the Seventh Circuit has refused to enforce an agreement mandating arbitration of job bias claims and relinquishing an employee's right to a jury trial.[581] Elsewhere, the Eleventh Circuit has held that an injured employee's right to file an ADA lawsuit is not subject to the compulsory arbitration clause of a collective bargaining agreement.[582] The court relied on the Supreme Court's decision in *Alexander v. Gardner-Denver Company*,[583] in which the Court found that an employee's statutory rights under title VII of the Civil Rights Act of 1964 are not waived through collective bargaining.[584]

Finally, EEOC officials have been vocal in stating their position on this issue in conferences and training around the country.[585] One agency official has described mandatory arbitration of employment disputes as the greatest threat to civil rights enforcement.[586] In setting forth the agency's position on this issue, EEOC's Legal Counsel stated that mandatory arbitration will eliminate access to the courts for employees with disabilities.[587] Further, mandatory arbitration has numerous disadvantages: review of decisions is limited; decisions are not made public; arbitrators often have no background in the law; there are limits on discovery procedures and on remedies; and litigants on both sides have to pay arbitration fees.[588]

The Family and Medical Leave Act and the ADA

Although EEOC does not enforce the Family and Medical Leave Act of 1993 (FMLA),[589] it has recognized the interplay between the ADA and the FMLA in a fact sheet developed by the Office of Legal Counsel.[590] This document provides technical assistance on commonly asked questions that have arisen about the interplay between the FMLA and two civil rights statutes, the ADA and title VII of the Civil Rights Act of 1964.[591] The 23 questions and answers about these acts appear to be the extent of EEOC's outreach and education for employers and employees about the FMLA and its relationship to statutes under EEOC jurisdiction. EEOC appears to have intended the fact sheet to be a quick information guide for those who are not familiar with the three laws and how they apply to the workplace.

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[580] Ibid.

[581] Gibson v. Neighborhood Health Clinics, Inc., 121 F. 3d 1126 (7th Cir. 1997). (Finding agreement to arbitrate unenforceable as the contract did not contain adequate consideration for employee's promise).

[582] Brisentine v. Stone & Webster Engineering Corp., 117 F. 3d 519 (11th Cir. 1997).

[583] 415 U.S. 36 (1974).

[584] *Id. at* 51–52.

[585] *See* "EEOC Officials Discuss,", p. 65; "Briefs," *Americans with Disabilities Act Newsletter (BNA)*, vol. 6, no. 15 (Aug. 14, 1997), p. 90 (hereafter cited as "Briefs").

[586] "Briefs," p. 90.

[587] "EEOC Officials Discuss," p. 65.

[588] Ibid.

[589] 29 U.S.C §§ 2601—2654 (1994).

[590] This interplay may be observed, for example, by comparing the statutory language of the two acts. The ADA's requirement for an employee to show substantial limitation of a major life activity is analogous to the FMLA's requirement of a "serious health condition" that renders an employee unable to perform job duties. The overlap occurs because the employee may obtain leave as a reasonable accommodation under the ADA or an entitlement under the FMLA. According to a Washington, D.C., management attorney, "the most common issues I hear about are leave requests overlapping with FMLA and transfer requests." He also said that courts are just starting to address the overlap between the two acts, especially in intermittent leave situations for chronic physical disabilities or psychological disabilities. *See* "Headache or Harmony: What Lies Ahead for ADA Litigators?" *National Disability Law Reporter Highlights (LRP)*, vol. 12, iss. 8 (Aug. 13, 1998), p. 9.

[591] EEOC, "The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964" (undated) (hereafter cited as EEOC, "The Family and Medical Leave Act, the ADA and Title VII"); http://www.eeoc.gov/docs/fmlaada.txt, Sept. 26, 1997. One disability professional has recommended that similar guidelines be developed on the overlap between the ADA and the National Labor Relations Act and the overlap between the ADA and the Occupational Safety and Health Act. Michelle Martin, Staff Services Analyst, Department of Rehabilitation, State of California Health and Welfare Agency, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, attachment, p. 16.

Background

The need for workers to take leave from their jobs is a major concern in the workplace of the 1990s.[592] Congress sought to address this need with the FMLA. The act, which is enforced by the U.S. Department of Labor, assists employees who need leave temporarily due to their own or family member's disabilities or health problems who, before passage of the FMLA, might have lost their health insurance or even their jobs in trying to secure this leave.[593]

There are important similarities between the ADA and the FMLA. Although these laws represent two different public policies with two different objectives, they both protect employees with significant health concerns, disabilities under the ADA, and "serious health conditions" in the language of the FMLA.[594] Moreover, an individual can be both "disabled" within the meaning of the ADA and have a "serious health condition" within the meaning of the FMLA.[595] As these statutes have similar objectives, it is logical that policymakers and courts have sought to harmonize the two statutes based on the rules of statutory interpretation.[596] One example of this harmonization is the U.S. Department of Labor's FMLA regulations, which specifically mention the ADA in stating:

> Nothing in [the] FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of. . .disability. [The]. . .FMLA's legislative history explains that [the] FMLA is "not intended to modify or affect the Americans with Disabilities Act of 1990, or the regulations issued under that act. . . . An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. . . .[597]

Legislative Histories

Since the ADA was passed 3 years before the Family and Medical Leave Act,[598] its legislative history makes no direct reference to the FMLA. The ADA does, however, indicate that Congress did not intend for the ADA to be an impediment to anyone seeking a remedy for discrimination under another law:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.[599]

ADA

The ADA's legislative history addresses the leave needs of employees with disabilities.[600] In the House Education and Labor Committee report accompanying the final ADA bill, Congress stated that "reasonable accommodation may also include providing additional unpaid leave days, if such provision does not result in an undue hardship for the employer."[601] Although the Senate legislative history does not state that leave is a form of reasonable accommodation, it does not expressly preclude leave as a reasonable accommodation.[602] Unlike the FMLA, which makes leave an entitlement to those who meet its requirements, the ADA allows leave contingent on whether the leave poses an undue hardship on the employer.[603]

FMLA

Sen. Christopher J. Dodd did not introduce the bill that would become the FMLA until

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[592] James Passamano, "Employee Leave Under the Americans with Disabilities Act and the Family and Medical Leave Act," *South Texas L. Review*, vol. 38 (July 1997), p. 861 (hereafter cited as Passamano, "Employee Leave Under the ADA and the FMLA").

[593] *See* 29 U.S.C. §§ 2601, 2611–12 (1994). *See also* Passamano, "Employee Leave Under the ADA and the FMLA."

[594] Passamano, "Employee Leave Under the ADA and the FMLA."

[595] Bonnie P. Tucker and Bruce A. Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law* (LPR Publications Horesham, Pennsylvania) Volume II, Supplement 8 (March 1996), pp. 22:35 (hereafter cited as Tucker and Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law*).

[596] CRS, ADA: *Implementation Issues*.

[597] 29 C.F.R. § 825.702(a) (1997).

[598] The ADA was enacted in 1990 *See* 42 U.S.C. §§ 12,101–12,213 (1994). The FMLA was passed in 1993. *See* 29 U.S.C. §§ 2601–2605 (1994).

[599] 42 U.S.C. § 12201(b) (1994).

[600] H. Rep. No. 101–485(II), at 72 (1990).

[601] *Id.*

[602] Passamano, "Employee Leave Under the ADA and the FMLA."

[603] *See* 42 U.S.C § 12112(5) (A) (1994).

January 21, 1993.[604] However, since 1987, the Committee on Labor and Human Resources Subcommittee on Children, Family, Drugs, and Alcoholism had been hearing testimony on family and medical leave proposals.[605] Witnesses testified about the difficulties they faced in attempting to meet the needs of family life and the demands of their jobs while either they or family members were ill.[606]

S. 5 entitled employees to unpaid leave in cases involving the birth or adoption of an employee's child, or the serious health condition of an employee or of the child, spouse, or parent of an employee.[607] Employers with 50 or more employees were covered by this bill.[608] The legislative history stated that the need for this legislation was based on the congressional finding that:

> Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to place a heavy burden on families, employees, employers and the broader society. S. 5 provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.[609]

The FMLA's legislative history does not mention an interplay with the ADA.[610] However, Congress stated that nothing in the act could be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.[611] Thus, Congress recognized a potential interaction between the two laws, and expressed its concern that it should be a harmonious one.

Objectives

Each act was created to address unique objectives, but both acts affect the workplace and its employees, specifically those with disabilities. Under both acts, employers must inform employees of their rights by posting notices.[612] These postings are required for all covered employers regardless of whether or not they have employees covered under each act.[613] All public agencies, including State and local governments, are covered by each act regardless of the number of employees they have.[614]

The ADA, however, is a civil rights law while the FMLA seeks to serve a narrower purpose, namely, employee leave needs. The narrower purpose is reflected in the narrower scope of the FMLA. Under the ADA, employers with "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year,"[615] must comply with the statute. However, under the FMLA, the workplace must employ "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."[616] An employee with a disability seeking medical leave in a company with less than 50 employees may not even be entitled to FMLA rights at all and therefore may have to rely solely on ADA provisions.

Scope and Coverage

The coverage of each act is also different. Under the FMLA, for example, requirements are less restrictive and apply to a greater number of employees. This is consistent with the FMLA's goal of addressing the basic leave needs of employees at companies of at least 50 employees.[617] Under the FMLA, employees are eligible as along as they have been: (1) employed by the employer for at least 12 months, (2) employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of leave, and (3) employed at a work site where 50 or more employees are employed by the employer within 75 miles of that work site.[618]

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[604] S. 5, 103rd Cong. (1993).

[605] Passamano, "Employee Leave Under the ADA and the FMLA."

[606] Ibid.

[607] S. 5, 103rd Cong. § 102 (1993).

[608] *Id.* § 101(4) (1993).

[609] S. Rep. No. 103–3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2, 6.

[610] *See generally id.*

[611] 29 U.S.C. § 2651(a) (1994).

[612] Under the FMLA, notices must be in "conspicuous places where employees are employed." 29 C.F.R. § 825.300(a) (1997). Under the ADA, notices must be in "an accessible format to. . .employees." 42 U.S.C. § 12115 (1994).

[613] *See* 42 U.S.C. § 12115 (1994); 29 C.F.R. § 825.300(a) (1997).

[614] 29 U.S.C. § 2611(4) (A) (iii) (1994); 42 U.S.C. § 12131(1) (1994).

[615] 42 U.S.C. § 12111(5) (A) (1994).

[616] 29 U.S.C. § 2611(4) (A) (I) (1994).

[617] S. Rep. No. 103–3 at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2, 4.

Coverage under the FMLA as compared to the ADA is another important issue relating to the interplay between the two statutes. The gap between the 50 employees required for FMLA coverage and the 15 employees for ADA coverage is quite large. Many employees with disabilities may be unable to obtain necessary leave time. For example, if an employee with a disability who works for a company with 49 workers requests leave but his or her employer believes that granting the request would result in an undue hardship under the ADA, the employee does not have the benefit of the FMLA. In effect, this employee is not being granted equal treatment with an employee with a disability who works for a larger company. A disability law expert has argued that, at a minimum, Congress should lower FMLA's coverage to include employers with 15 or fewer employees to make it equitable with the ADA. Further, this expert stated that all labor relations laws should have the same coverage or employees who work for employers with fewer than 15 employees are being denied equal protection of the laws and their civil rights therefore are being violated.[619] This expert stated:

> All employees should be equally protected by the law and civil rights protection of an individual should not depend on the size of the employer. Also, there is a fundamental unfairness in a law that imposes obligation on one employer with 15 employees, but does not impose the same obligations on another employer with 14 employees. The unfairness is especially sharp when such similarly situated employers are in the same industry and may compete with one another. Also, business practices that develop in small employers do not suddenly change when the employer hires its fifteenth employee. Rather, small employers are not covered and have a license to engage in even the most offensive civil rights violations with impunity. An organization that has discriminatory employment practices will likely persist in such practices as the business grows. Uniform coverage of civil rights laws would prevent discriminatory practices from developing in small business. If Congress is concerned about the costs to small business, it may enact a cap on damages for employers from 1 to 14 employees, just as it has done for other employers in the Civil Rights Act of 1991.[620]

Leave under the FMLA is a right that is not subject to undue hardship, potentially unsuccessful reasonable accommodation, or a rigorous test to meet to show disability.[621] Under the ADA, there is no guarantee of leave, continued health insurance and benefits, or job reinstatement at an equal level.[622]

Protection under the ADA is limited to a more precisely defined group of people, those who are qualified individuals with a disability.[623] The FMLA requires that the employee have a "serious health condition."[624] An employee who seeks leave under the ADA must show that she or he is a part of this group as it has been defined under the law, its regulations, and in case precedent in the courts. The FMLA regulations state that "serious health condition" means "an illness, injury, impairment, or physical or mental condition that involves"[625] (1) inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, . . . or any subsequent treatment in connection with such inpatient care; or (2) continuing treatment by a health care provider."[626]

Leave Policies

Before leave is granted, certain circumstances must prevail under each act. EEOC's title I regulations provide for the possibility of leave under the ADA as a reasonable accommodation.[627] Based on the ADA's legislative history, the EEOC has interpreted the act to include additional unpaid leave as a form of reasonable accommodation, again subject to "undue hardship." Although the ADA does not entitle employees to leave, EEOC's title I regulations state that "accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment."[628]

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[618] 29 U.S.C. § 26311(2) (A)–(B) (1994).

[619] James Passamano, Sufian & Passamano, Houston, TX, telephone interview, Oct. 27, 1997, pp. 2–3 (hereafter cited as Passamano interview).

[620] Ibid., p. 3.

[621] *See generally* 29 U.S.C. §§ 2601–2605 (1994).

[622] *See generally* 42 U.S.C. §§ 12111–12117 (1994).

[623] 42 U.S.C. §§ 12111(8), 12112(a) (1994).

[624] 29 U.S.C. § 2612(a) (1994. An employee may also obtain leave under the FMLA to care for a newborn or recently adopted child or to care for a family member with a serious health condition). *Id.*

[625] 29 C.F.R. § 825. 114(a) (1997).

[626] *Id.* § 825.114(a) (1997).

[627] *Id.* § 1,630.2(o) (1996).

In addressing the situation where an employer does have a leave policy, EEOC's title I interpretive guidance states that "an employer, in spite of its 'no leave' policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision would impose an undue hardship."[629] The policy of employee leave under this provision can be interpreted broadly. However, requiring an employer to consider allowing an employee with a disability leave when the company has a "no leave" policy does not guarantee the worker the time off.

The FMLA, on the other hand, does not involve reasonable accommodation.[630] Under the FMLA leave may be granted to employees for their own or a family member's illness. In addition, it specifies circumstances for which leave must be granted if requested: (1) for the birth of a child, and to care for the newborn child; (2) for placement with the employee of a child for adoption or foster care; (3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; and (4) because of a serious health condition that makes the employee unable to perform the functions of the employee's job.[631]

Another important aspect of the issue of leave is the amount of time off granted under each act. With the FMLA, the amount of leave is specifically identified: "[a]n eligible employee's FMLA leave entitlement is limited to a total of 12 work weeks of leave during any 12-month period."[632] It is important to note that leave may not be paid,[633] but an employee can elect to substitute paid leave for the FMLA leave.[634] Employees using the FMLA leave do not have to use the full 12 weeks all at once. An employee found to be suffering from a "serious health condition" could elect to work a reduced leave schedule until the equivalent of the 12 work weeks of leave were used.[635]

Under the ADA, however, no limit on leave is stated, because the act itself does not expressly mention employee leave. However, as noted, the issue of leave has been interpreted to fall under the act's "reasonable accommodation" provision. An employer covered by the ADA, whether the company has an employee leave policy or not, has to make reasonable accommodations for qualified disabled employees so long as that accommodation does not impose an "undue hardship" on the company.[636] The use of accrued paid leave or providing additional unpaid leave has been included as a form of accommodation, but again, no time limit has been specified under the ADA as it has under the FMLA.[637]

The ADA's legislative history provides for part-time or modified work schedules for employees with a disability.[638] However, leave under this act has been difficult for employees to obtain. The courts have held that an "employee in need of leave is not a qualified individual with a disability as defined in the ADA."[639] Therefore, even though leave may be a form of reasonable accommodation, "the weight of reported authority makes leave practically unavailable under the ADA."[640]

Another difference between the two acts with respect to leave is the extent of employer prerogatives to grant employees' requested leave. Leave under the FMLA is an entitlement as long as the employee meets the requirements.[641] Under the ADA, however, requested medical leave must be balanced with the employer's need to avoid "undue hardship."[642] Thus, when an employee with a disability requests a leave of absence for health reasons, that request is weighed against the "undue hardship" that may be imposed upon the employer by such an absence.[643] The act defines an "undue hardship" as an action requiring significant difficulty or expense on behalf of the employer.[644] When an employer demonstrates that the worker's leave would impose an "undue hardship," the employer is exempt from any obligation to provide leave as a reasonable accommodation.[645]

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[628] *Id.* at pt. 1630 app. § 1630.2(o) (1997).

[629] *Id.* at pt. 1630 app. § 1630.15(b)–(c) (1997).

[630] *See generally id.* §§ 2601–2653 (1994).

[631] *Id.* at § 2612(a) (1).

[632] *Id.* § 825.200(a) (1997).

[633] *Id.* § 825.207(a).

[634] *Id.*

[635] *See id.* at § 825.205(a) (1997).

[636] 42 U.S.C. § 12112(b) (5) (A) (1994).

[637] 29 C.F.R. § 1630.2(o) (1997).

[638] *See* Passamano, "Employee Leave Under the ADA and the FMLA."

[639] Ibid.

[640] Ibid.

[641] *See* 29 U.S.C. § 2612(a) (1) (1994).

[642] 42 U.S.C. § 12112(5) (A) (1994).

[643] *Id.*

[644] *Id. at* § 12111(10) (A).

An employee may be eligible for leave under both laws. An example of a situation in which an employee may be covered by both laws is as follows: an employee becomes paralyzed as a result of an off-the-job car accident. The employee now has a disability under the ADA. Thus, the employer must not engage in discrimination based on disability and consider reasonable accommodations, if needed, and, in addition, if the employee requests it, grant up to 12 weeks of leave under the FMLA for treatment and recovery.[646]

Medical Certification and Employee Records

A controversial issue relating to the eligibility under both laws is that of medical certification and employee records. An ADA expert calls this situation a "potential" problem.[647] Under the ADA, medical examinations and inquiries are almost universally prohibited.[648] The ADA permits exams that are job related and consistent with business necessity.[649] According to another expert, inquiries are permitted on a job-related basis, so the potential conflict is lessened.[650] It is only within the reasonable accommodation claim that an employer may require an employee with a disability to undergo medical examinations or certifications.

Under the FMLA, the employer may request certification before the leave begins, and every 30-day period of the leave.[651] The FMLA requires that the employee provide the employer "sufficient certification," which includes the following: (1) the date on which the serious health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and (4) a statement that the employee is unable to perform the functions of the position.[652] Any records obtained for leave under the FMLA are to be kept in accordance with the regulations of the Fair Labor Standards Act[653] and are also subject to the confidentiality requirements of the ADA.[654]

The issue of questioning the health of an employee with a disability has warranted some concern. The general concern is that requesting this information may violate the ADA's restrictions on medical inquiries.[655] This seems particularly problematic because the FMLA allows the health care provider to answer questions about the "appropriate medical facts within the knowledge of the health care provider regarding the condition."[656] This may be in violation of the ADA provision that states that an employer "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."[657]

To avoid any violations of either provision, the Department of Labor has issued a guideline for this circumstance. In the event that a health care practitioner must answer questions about an employee's health, those answers must be limited in scope to the health condition for which the employee is seeking leave. For instance, if an employee is seeking leave under the FMLA, the medical questions must pertain solely to the health problem causing the leave, and should not make reference to the employee's disability.[658]

Employee Health Benefits

Once all of the requests and certifications for leave are completed and granted, another issue arises for those employees who will be absent from work for an extended period of time: the issue of benefits. For instance, will an employee with a disability who seeks leave under either act be able to retain his or her health care insurance during leave? Since leave is not addressed directly in the ADA, the issue of whether those who take leave as a reasonable accommodation are entitled to retain their benefits comes into question. It is implied in the regulatory provision that since reasonable accommodation means: "modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities"[659] that if an employee without a disability gets some type of sick leave under company policy and does not lose his or her benefits, then neither will workers with a disability. Still, there is no guarantee under the ADA that an employee with a disability will have full coverage when on leave.

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[645] *Id. at* § 12112(5) (A) (1994).

[646] *See* 29 C.F.R. § 825.702(b) (1997).*See also* James G. Frierson, *Employer's Guide to the Americans with Disabilities Act*, 2nd ed. (Washington, DC: Bureau of National Affairs, 1995) (hereafter cited as Frierson, *Employer's Guide to the ADA*).

[647] James Frierson, telephone interview, Oct. 27, 1997 (hereafter cited as Frierson interview).

[648] 42 U.S.C. §12112(d) (4) (1994).

[649] *Id.* § 12112(5) (A) (1994).

[650] Passamano interview.

[651] 29 C.F.R § 825.305(b), 825.308(a) (1997).

[652] *Id.* § 2613(b) (1994).

[653] *Id.* 825.500(a) (1997.

[654] *Id.* § 825.500(g).

[655] Frierson, *Employer's Guide to the ADA*.

[656] Ibid.

[657] 42 U.S.C. § 12112(4) (1994).

[658] *See* Frierson, *Employer's Guide to the ADA*, pp. 4–5.

However, if the disabled worker were taking leave under the FMLA, the issue of benefit retention would not arise. In the legislative history of the FMLA, Congress stated that an employer is required "to maintain health insurance benefits during period of leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of the leave."[660] If the employee makes copayments on the insurance premiums, then these payments must be kept up while the employee is on FMLA leave.[661]

Extended Leave

What happens, however, when an employee opts to take leave under the FMLA, but is still unable to work at the end of the 12 weeks? This is a problem that often faces employees with disabilities. Unfortunately for those who are in continual need of leave, after the 12 work weeks of FMLA leave, the employee no longer has the protections of the FMLA and must look to a workers' compensation statute or the ADA for any additional relief or protections.[662] The EEOC has noted that an employee with a disability who has used all of his or her FMLA leave is entitled to additional unpaid leave under the ADA unless it imposes an "undue hardship" on the employer.[663] If an employer claims that the absence will be an "undue hardship," then the employee will not be granted leave.

To handle such situations, one expert has suggested that employers should consider each request for extended leave "on a case-by-case basis."[664] He also notes, however, that combining these two types of leave may create an "excessive leave time that is a real burden on an employer."[665]

When employees do eventually return from leave, what are their rights? Under the ADA, job restoration is not expressly required.[666] The EEOC Technical Assistance Manual, however, lists possibilities for accommodation after ADA leave as (1) job restructuring, (2) reassignment to vacant positions, and (3) modified work schedules.[667] It does not require that the positions or the pay must be equivalent to the job the employee had before the leave.[668] In fact, the employee is not even guaranteed any position.[669] The case under the FMLA is much different. On return from leave, an employee is entitled to be returned to the same position the employee held when leave began, or to an equivalent position with equivalent benefits, *pay, and other terms and conditions of employment.*[670]

Continuing Need for Awareness and Education

One expert has stated that human resources departments and company managers should be more aware of the ADA and FMLA interplay for their employees who have disabilities. Employees as well are often unaware of their rights.[671] Another expert notes that employees "may know about a right to leave, but not about when they become eligible or how it works. Largely, especially in the working trades or blue collar jobs where the workforce tends to not be as sophisticated, employees generally are unaware of their federal and state rights, despite postings."[672] There is a need for more education and activity on behalf of the employer for his or her employees. EEOC and DOL are responsible for providing the necessary information to employers so that they, in turn, can provide the information to their employees.

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[659] 29 C.F.R § 1630.2(o) (1) (iii) (1997).

[660] S. Rep. No 103–3 at 31 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2, 33 (1893).

[661] 29 C.F.R. § 825.210(a) (1997).

[662] *Id.* at 825.216(d) (1997).

[663] Tucker and Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law.*

[664] Frierson, *Employer's Guide to the ADA.*

[665] Ibid.

[666] *See generally* 42 U.S.C § 12111–12117 (1994).

[667] EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act,* (EEOC–M–1A), January 1992, p. I–5 (hereafter cited as EEOC, *Title I Technical Assistance Manual*). *See also* Frierson, *Employer's Guide to the ADA.*

[668] EEOC, *Title I Technical Assistance Manual,* p. I–5.

[669] Ibid.

[670] 29 U.S.C. § 2614(a) (1994).

[671] Frierson interview.

Application of ADA to Conduct Overseas and Foreign Employers in the United States

In October 1993, EEOC released a short policy guidance on the application of title VII and the ADA to American and American-controlled employers overseas and to foreign employers within the United States.[673] This guidance explains the meaning of the term "employee" as it pertains to a citizen of the United States who may be employed overseas, either with an American company or a foreign corporation controlled by an American employer. It provides examples of how the laws apply and under what circumstances.[674] The document also provides the same information on how to apply the laws to foreign employers operating within the United States. Finally, the guidance provides instruction to investigators on how to proceed with the investigation of charges of discrimination against such employers.[675]

Discrimination by Employers Abroad

The guidance explains that Congress disagreed with the U.S. Supreme Court on whether title VII and the ADA applied extraterritorially to United States employers abroad.[676] In 1991, the Supreme Court decided the companion cases of *EEOC v. Arabian American Oil Company* and *Boureslan v. Arabian American Oil Company*.[677] The Court held that title VII of the Civil Rights Act of 1964 did not apply extraterritorially to regulate the employment practices of United States employers that discriminate against United States citizens abroad.[678]

Congress responded to the *Boureslan* decision by enacting section 109 of the Civil Rights Act of 1991,[679] which amended title VII and the ADA to provide that discrimination against U.S. citizens abroad will be covered if engaged in by an American employer or by a foreign corporation controlled by an American employer.[680] Section 109 also states that neither title VII nor the ADA will apply "to the foreign operations of an employer that is a foreign person not controlled by an American employer."[681] Finally, section 109 identifies factors to be used in assessing whether an American employer controls a foreign corporation[682] and provides a defense for violations of the ADA if compliance with the ADA would "cause" a covered entity to violate the law of the foreign country in a workplace in the foreign country.[683]

The guidance states that an initial question to be addressed in investigating charges of overseas ADA discrimination is whether the company that allegedly discriminated is an American employer.[684] An investigator should look to a company's place of incorporation in determining an employer's nationality,[685] and where an employer is incorporated in the United States, it will typically be deemed an American employer.[686] Other relevant factors to consider are the company's principal place of business, the nationality of dominant shareholder or individuals holding voting control, and the nationality and location of management.[687] These factors must be considered on a case-by-case basis and no one factor is determinative.[688]

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[672] Passamano interview.

[673] EEOC, "Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States," (EEOC Notice 915.002), Oct. 20, 1993 (hereafter cited as EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas").

[674] Ibid., pp. 1–15.

[675] Ibid., pp. 16–24, 25–30.

[676] Ibid., p. 2.

[677] 499 U.S. 244 (1991).

[678] *Id. at* 259.

[679] Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077–78 (The legislative history of the Civil Rights Act of 1991 makes clear that the purpose of section 109 was to respond to the *Boureslan* decision. Section 109 was intended to "extend the protections of [t]itle VII and the [ADA] to American citizens working overseas for American employers." 137 CONG. REC. S15235 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy).

[680] *See id. at* § 109, 105 Stat. at 1077–78 (codified at 42 U.S.C. §§ 2000e-1, 12112c (1994)).

[681] *See id.*

[682] *See id.*

[683] *See id.*

[684] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 5.

[685] Ibid.

Even if an entity is not itself American, the discriminatory conduct will be covered if the entity is "controlled" by an American employer. According to the guidance, an assessment of whether there is control should include consideration of the following four factors: the interrelation of operations, the common management, the centralized control of labor relations, and the common ownership or financial control of the employer and the foreign corporation.[689] All four criteria need not be present in all cases to determine that there is control by an American employer.[690]

Under the "foreign laws defense" an employer may engage in otherwise prohibited action if compliance with the ADA would cause an employer to violate the law of the foreign country in which the workplace is located.[691] A defendant must prove three elements to establish a defense: (1) the action is taken with respect to an employee in a workplace in a foreign country, where (2) compliance with the ADA would cause the defendant to violate the law of the foreign country; (3) in which the workplace is located.[692] Under this defense, it is the employer's burden to prove that the defense is applicable and that the standards of the defense are satisfied.[693]

Discrimination by Foreign Employers Within the United States

The guidance states that ADA applies to a foreign employer if it discriminates in the United States. According to the guidance:

> By employing individuals within the United States, a foreign employer invokes the benefits and protections of U.S. law. As a result, the employer should reasonably anticipate being subjected to the title VII enforcement process should any charge of discrimination arise directly from the business the employer does in the United States.[694]

A foreign or foreign-owned employer within the United States may invoke the terms of a treaty or other international agreement that limits the applicability of U.S. antidiscrimination laws.[695] When a treaty is invoked as a defense, the guidance states that an investigator should first confirm that the identified treaty in fact exists and should ask the respondent to produce a copy of it.[696] The investigator then should determine: (1) whether the respondent is protected by the treaty; (2) if so, whether the employment practices at issue are covered by the treaty; and (3) if so, the impact of the treaty on the application of title VII or the ADA.[697]

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[686] Ibid., pp. 5–6.

[687] Ibid., p. 6.

[688] Ibid.

[689] Ibid., p. 7 (citing 42 U.S.C. § 12112(c) (2) (C) (1994)).

[690] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 9 (citing Lavrov v. NCR Corp., 600 F. Supp. 923, 927 (S.D. Ohio 1984); EEOC, "Policy Statement on the Concepts of Integrated Enterprise and Joint Employer," No. N–915, pp. 4–5 (June 6, 1987); EEOC, "Policy Guidance: Application of the Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act of 1963 (EPA) to American Firms Overseas, Their Overseas Subsidiaries, and Foreign Firms," N–915.039 (Mar. 3, 1989), p. 9).

[691] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 11 (citing 42 U.S.C. § 12112(c) (1) (1994)).

[692] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 12 (citing EEOC, "Policy Guidance: Analysis of the Sec. 4(f) (1) 'Foreign Laws' Defense of the Age Discrimination in Employment Act of 1967," No. N–915.046 (Dec. 5, 1989)).

[693] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 12, n.10 (citing International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, , (1991) and Mahoney v. RFE/RL, Inc., 818F. Supp. 1 (D.D.C. 1992) *rev'd on other grounds*, 47 F.3d 447 (1995).

[694] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," pp. 16–17.

[695] Ibid., p. 17.

[696] Ibid., p. 18.

Charge Processing Instructions

The guidance moves into questions intended as guidance for structuring an investigation into charges of discrimination outside the United States or by foreign employers inside the United States.[698] The guidance closes with summary statements on its main subject matter.[699]

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[697] Ibid., pp. 18–19.

[698] Ibid., pp. 26–28.

[699] Ibid., p. 31.

6 Assessment of Title I Enforcement Activities: Charge Processing

One of EEOC's primary responsibilities is to receive, investigate, and resolve charges of discrimination under the ADA and other nondiscrimination in employment statutes. Persons who believe that they have been discriminated against in employment may file a charge of discrimination with EEOC or with a fair employment practices agency in their area.[1] EEOC field offices (district, area, and local offices) are the primary recipients of charges and are, in most cases, responsible for all enforcement activities, from intake to resolution.[2] EEOC Commissioners also may initiate charges of discrimination even when there is no individual charge of discrimination, often in cases where individuals may not be aware that they have been discriminated against or are unaware of their rights.[3]

After receiving a charge, EEOC investigates. At the conclusion of the investigation, EEOC issues a letter of determination of "reasonable cause" to believe that discrimination has occurred[4] or "no reasonable cause." If EEOC has found reasonable cause, it will attempt conciliation, or to arrive at an agreement between the parties under which the respondent employer agrees to voluntary compliance. If EEOC's attempts to conciliate fail, it must decide whether to go to court or to issue a right to sue notice. If EEOC determines that the case should be litigated, it files suit in Federal court on behalf of the charging party.[5] Charging parties may bring suit in Federal court once EEOC issues a right to sue notice. EEOC will issue a right to sue notice if it has dismissed a charge, if it has found no reasonable cause, or if it has found reasonable cause, conciliation efforts have failed, and EEOC has decided not to file suit itself.[6]

The Americans with Disabilities Act is a complex statute, and the vagueness and complexity of ADA concepts of "individual with a disability," "essential functions," "qualified individual," and "substantially limited" affect charge processing.[7] For example, the director of the Chicago District Office stated that the qualitative differences between the ADA and other statutes that EEOC enforces have presented difficulties. Because of the complexities of the law and its relative newness, EEOC has yet to take on some of the more serious issues, as it has with other laws. In addition, EEOC may have underestimated the difficulties staff has had with the law.[8] An investigator in the Oklahoma Area Office stated that ADA cases need more thorough investigation than charges filed under other statutes enforced by EEOC.[9] A trial attorney noted that the difference between litigating ADA cases and other cases is that the ADA is still rather new, and there are some differences across the circuits on certain issues.[10] The enforcement manager in the Los Angeles District Office stated that the ADA is not necessarily more complex than other laws, but more steps are necessary in handling an ADA case.[11]

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[1] A charge of discrimination is a written document alleging discrimination by an employer in violation of the ADA or one of the other statutes enforced by EEOC. Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, p. 0:3201. However, individuals alleging only violations of the Equal Pay Act file "complaints," not "charges."

[2] U.S. Equal Employment Opportunity Commission (EEOC), "Organization, Mission, and Functions," p. XV–3–22. Even when complainants contact headquarters about their complaint, they are sent to the appropriate field office for disposition.

[3] Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, p. 0:3202.

[4] EEOC finds "reasonable cause" when it has found that "it is more likely than not" that discrimination has occurred. Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, p. 0:3501.

[5] U.S. General Accounting Office, *EEOC's Expanding Workload*, fig 1, p. 5.

[6] *See* Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, p. 0:3502.

[7] Kathryn Moss and Matthew C. Johnsen, "Employment Discrimination and the ADA: A Study of the Administrative Complaint Process," *Psychiatric Rehabilitation Journal*, vol. 21, no. 2 (Fall 1997) p. 118.

EEOC staff believes that the agency has done a good job, overall, of enforcing the ADA.[12] Many noted that since the implementation of the Priority Charge Handling Procedures, their jobs have not necessarily changed. However, one EEOC official stated, the implementation of the new procedures has empowered staff. Investigators have more autonomy in charge processing, there is more interaction between investigators and attorneys, and there are fewer layers of review. Thus, charge processing is handled more efficiently than before.[13]

People outside of the EEOC generally appear to believe that EEOC staff is adequately trained and handling complaints properly,[14] but that the agency has too few resources to handle the large number of charges it receives.[15] For instance, the assistant commissioner of the State of Tennessee's Division of Rehabilitation Services wrote that "two EEOC investigators cannot appropriately investigate ADA complaints for two-thirds of this state (Middle and East TN) in a timely manner" and urged increased funding and staff to implement and enforce the ADA.[16] A perennial complaint about EEOC's charge processing is that it takes too long for EEOC to resolve complaints.[17] A representative of one of the National Institute on Disability and Rehabilitation Research's disability and business technical assistance centers wrote that "[t]he time period from filing to resolution is a hardship on most individuals and many give up or decide not to file because they have heard from other people that it takes a long time or have had other experiences with the process."[18] Several individuals wrote the Commission that proactive compliance reviews would be a useful addition to EEOC's ADA enforcement efforts because they would put employers "on notice that it may be their company that will be reviewed next and it will help to keep compliance as a major topic of everyday business."[19]

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[8] John Rowe, District Director, Chicago District Office, EEOC, telephone interview, Apr. 16, 1998, pp. 1–2 (hereafter cited as Rowe interview).

[9] Dick Valentine, Investigator, Oklahoma Area Office, EEOC, telephone interview, Apr. 15, 1998, p. 2 (hereafter cited as Valentine interview).

[10] Toby Costas, Trial Attorney, Dallas District Office, EEOC, telephone interview, Apr. 13, 1998, p. 2 (hereafter cited as Costas interview).

[11] Rosa Viramontes, Enforcement Manager, Los Angeles District Office, EEOC, telephone interview, Apr. 10, 1998, p. 2 (hereafter cited as Viramontes interview).

[12] *See* Spencer Lewis, District Director, New York District Office, EEOC, telephone interview, Apr. 9, 1998, p. 1 (hereafter cited as Lewis interview); Cynthia Pierre, ADR Coordinator/Deputy Director, Chicago District Office, EEOC, telephone interview, Apr. 15, 1998, p. 1 (hereafter cited as Pierre interview); Jeffrey Bannon, Regional Attorney, Dallas District Office, EEOC, telephone interview, Apr. 15, 1998, p. 1 (hereafter cited as Bannon interview).

[13] Pierre interview, p. 1.

[14] *See, e.g.*, Kayla A. Bower, Executive Director, Oklahoma Disability Law Center, Inc., letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), U.S. Commission on Civil Rights (USCCR), Apr. 6, 1998, attachment, p. 3 (hereafter cited as Bower letter); Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998, attachment, p. 3 (hereafter cited as Ringer letter) (stating: "EEOC's field staff is performing admirably under a tremendous volume of cases. . . Staff appear trained."); Kathy Ertola, Assistant ADA Coordinator, California Department of Social Services, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 26, 1998, p. 2 (stating: "The charge processing system in the EEOC in San Francisco has been fine.").

[15] Carl Brown, Assistant Commissioner, Division of Rehabilitation Services, Department of Human Services, State of Tennessee, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, attachment, p. 2.

[16] Ibid., attachment, p. 1.

[17] *See, e.g.*, David Eichenauer, Access to Independence and Mobility, fax to Nadja Zalokar, Director, American with Disabilities Act Project, USCCR, June 4, 1998 (hereafter cited as Eichenauer fax); Carl Suter, Associate Director, Office of Rehabilitation Services, Illinois Department of Human Services, letter to Frederick D. Isler, Assistant Staff Director, OCRE, June 9, 1998 (hereafter cited as Suter letter); Bower letter, attachment, p. 3.

[18] Responses by National Institute on Disability and Rehabilitation Research Americans with Disabilities Act Technical Assistance Program grantees related to DOJ/EEOC Enforcement, Jan. 6, 1998, provided to the Commission by

The Commission also received several specific criticisms of EEOC's charge processing: one that there had been a report that EEOC's Atlanta office, "under the pressure of enormous caseloads, is discouraging what may be legitimate cases if they are inartfully stated or if they seem difficult to prove or corroborate,"[20] another that the Chicago office had been accused of "dismissing valid complaints because of their heavy workload,"[21] and a third that EEOC had not been particularly helpful in resolving an employer's problem of how to maintain safety after EEOC determined that being able to subdue an assaultive patient was not an "essential function" of a psychiatric technician's job. According to a representative of the State of California's Department of Rehabilitation:

> In this situation the agency felt that EEOC did an incomplete job. They felt the situation was not investigated completely, especially since they were able to produce statistics on the numbers and kinds of injuries sustained by [psychiatric technicians] doing takedowns, and how their policy of pairing two technicians physically able to effect a takedown was a proven matter of safety.[22]

Another disability professional wrote:

> Some of the EEOC investigators our agency have dealt with were not sensitive to an. . .[individual's] need for assistance in developing a charge. They had expectations that an individual who felt they had been discriminated against should already know their rights and be able to identify the particular right which was violated. Rather, they should be working to help them identify the violations. Again, limited to the cases we have worked with or help assist in a referral to EEOC, the investigators were not as receptive to ADA complaints as their legal counterparts.[23]

Priority Charge Handling Procedures

Because of increasing workload and limited resources, the Chairman of EEOC appointed a Task Force on Charge Processing in 1994. The task force made several recommendations to streamline EEOC's charge processing procedures. Among these recommendations, the task force endorsed rescinding EEOC's unwritten policy, dating back to 1983, to conduct full investigations of every charge.[24] The full investigation process included obtaining relevant evidence or information, interviewing relevant witnesses, and verifying the accuracy and completeness of the evidence obtained.[25] The task force also recommended ending the practice of writing substantive no cause determinations for charges where no reasonable cause is found. Instead, the task force recommended that EEOC issue letters of determination using generic language for dismissing charges.

Another major recommendation of the task force was for EEOC to develop priority charge processing procedures to focus resources on charges with the most law enforcement potential.[26] The task force recommended that investi-

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David Esquith, National Institute on Disability and Rehabilitation Research (OCRE files), p. 3.

[19] Suter letter, attachment, p. 5; *see also* Eichenauer fax, p. 3.

[20] Ringer letter, attachment, p. 3.

[21] Suter letter, attachment, p. 5.

[22] Michelle Martin, Staff Services Assistant, Department of Rehabilitation, Health and Welfare Agency, State of California, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, OCRE, USCCR, May 11, 1998, attachment, p. 11.

[23] Amy Maes, Director, Client Assistance Program, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 30, 1998, attachment, p. 3.

[24] EEOC, "Charge Processing Task Force Report," p. 5. In 1993, EEOC reported that by law, each charge, except those involving age discrimination, is to be "fully investigated." As described in EEOC's manual of compliance standards, full investigation requires EEOC to investigate all charges and give all the same degree of attention. EEOC reported that this standard also applied to age discrimination cases, although this was not required. However, at a 1993 hearing, EEOC reported that in many instances, charges were not fully investigated. For example, in 1988, 40 to more than 80 percent of the charges from EEOC and fair employment practice agencies were not fully investigated. *See* General Accounting Office, *EEOC: An Overview*, Report to the Chairman, Subcommittee on Select Education and Civil Rights, Committee on Education and Labor, U.S. House of Representatives, July 27, 1993, pp. 2, 9 (hereafter cited as GAO, *EEOC: An Overview*).

[25] GAO, *EEOC's Expanding Workload*, p. 4.

[26] EEOC, "Charge Processing Task Force Report," pp. 4, 19.

gation of charges should be done in a timely manner for those cases that appear to be strong for enforcement, and to remove from the system those that appear to be nonmeritorious. EEOC would investigate the remaining charges as resources would permit.[27]

The purpose of these recommendations was to use less EEOC staff time on charges with little or no merit.[28] The recommendations were implemented in 1995 with the issuance of the new Priority Charge Handling Procedures. These procedures require staff to conduct determination counseling with the charging party to ensure that the charging party is informed of the reasons for EEOC's determination. The procedures also provide guidance on the limited situations when an office should consider reopening a case upon the request of the charging party.[29] The new procedures also provide a coordinated approach to case processing through investigation, conciliation, and litigation, in addition to technical assistance and public education.[30]

The focus of the new procedures is a charge prioritization system.[31] The procedures require all charges to be placed in one of three categories:

- *Category A* includes charges that that are priority charges under the National Enforcement Plan or the Local Enforcement Plan and charges that are likely to result in a cause finding, as well as charges where irreparable harm may result if processing is not expedited.
- *Category B* includes charges that require further investigation to determine whether they are likely to lead to a cause finding.
- *Category C* includes those charges where further investigation is not likely to lead to a cause finding.[32] Category C charges include: charges that fail to state a claim, those for which the agency has no jurisdiction, self-defeating charges, and allegations that are not credible (which includes charges by individuals who have filed a large number of repetitive charges).[33]

In March 1998, Acting EEOC Chairman Paul M. Igasaki testified before Congress on the effectiveness of the Priority Charge Handling Procedures. The new procedures, he said, "are designed to give [EEOC] the flexibility to immediately dismiss non-meritorious charges from the system. . .[and] have yielded dramatic results in a relatively short period of time."[34] About 29 percent of incoming charges are immediately dismissed or selected for further evaluation before classification.[35] A reduction of EEOC's backlog of charges has been attributed to the Priority Charge Handling Procedures. However, testimony before the House Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce revealed that much of the reduction in the backlog has been due the dismissal of category C charges.[36]

Generally, charge processing involves the following steps:

- *Intake:* The charging party is interviewed to determine the merits of the charge and to prepare a formal charge.
- *Categorization:* During or soon after intake, charges are categorized as A, B, or C, as defined by the Priority Charge Handling Procedures.
- *Investigation:* Charges are investigated in relation to the priority category they have been assigned.
- *Resolution/Closure:* Charges can be resolved through a "predetermination settlement" or other settlement, conciliation, or alternative dispute resolution. Cases are also resolved through litigation or closed when a notice of right to sue is issued to the charging party.

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[27] Ibid., p. 9.

[28] Ibid. p. 5.

[29] EEOC, "Priority Charge Handling Procedures," pp. 12–13.

[30] Ibid., p. 1.

[31] Ibid.

[32] Ibid., pp. 4–5; EEOC, *FY 1995 Annual Report*, p. 5.

[33] EEOC, "Priority Charge Handling Procedures," p. 5.

[34] *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. (Mar. 3, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

[35] Ibid.

[36] *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. 5 (Mar. 3, 1998) (statement of Helen Norton, Director of Legal and Public Policy, National Partnership for Women & Families) (hereafter cited as Norton testimony). Ms. Norton states that "significant additional resources" will be required to reduce the backlog further. Ibid.

Charge Intake

When individuals contact an EEOC office regarding a potential charge of discrimination, the office conducts "intake." During intake, EEOC staff informs the complainant of his or her rights under the law and obtains sufficient information from the complainant to develop a charge of discrimination (or to determine that the complaint is not jurisdictional or otherwise does not warrant a charge of discrimination). During this process, all charging parties must be informed of their right to file a charge and that they must file a charge to be able to file a private suit. Charging parties must also be informed of the possibility of retaliation by the respondent. They should be informed of what to expect during the processing of their charge.[37] They also should be given staff's "best initial assessment" of their evidence, to allow them to make an "informed decision" as to how to proceed, but they never should be discouraged from filing a charge.[38]

Charge intake is handled differently in the various EEOC field offices. Many offices have a rotation system in which investigative units take turns performing intake duties. For example, in the Charlotte District Office four investigative units rotate into intake on a weekly basis. Both investigators and supervisors are involved in intake. Attorneys are available during the intake process for consultation. If there is something that is compelling or that might have class implications, the investigators will talk to an attorney during intake. The Charlotte District Office used to have a permanent charge receipt unit, but now relies on the rotation system. According to the enforcement manager, with the rotation system it takes about the same amount of time to take charges; however, much more information is collected now than previously.[39]

Staff in the Los Angeles District Office spend approximately one-quarter of their time on intake. Investigative units rotate into intake every 6 weeks and are assigned to intake for 2 weeks.[40] Similarly, in the San Diego Area Office, intake is done by investigators on a rotational basis. Investigators are assigned to intake every 2 weeks.[41] In the Dallas District Office, units rotate into intake once every 5 weeks. Each unit has approximately six investigators and one supervisor.[42] In the Dallas office, a staff member usually investigates the charges taken by him or her at intake.[43]

The Chicago District Office has a pilot program to determine the feasibility of assigning staff permanently to do intake. A group of investigators is assigned to charge receipt for 5 to 6 months. Charges go to another unit for investigation. The district office has six investigators doing intake every day. Because only five staff members volunteered to be the permanent intake staff, each day a different investigator from other units is assigned to be the sixth person.[44]

According to the joint report of the Task Force on Priority Charge Handling Procedures and the Litigation Task Force, both models of intake have advantages. A dedicated intake unit with permanent staff "provides a level of consistency and specialization in the intake and categorization of charges."[45] Comparatively, according to the task forces, the rotation system "ensures that all investigators are well-versed in the [Priority Charge Handling Procedures] principles as applied to intake."[46] Thus, the task forces recommended that the Office of Field Programs assess the results of these two methods and share the information from the assessment with the field offices.[47]

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[37] This information can be provided in various formats, including videos, but must be accessible and provided in languages other than English if necessary. EEOC, "Priority Charge Handling Procedures," p. 6.

[38] Ibid., p. 7.

[39] Michael Witlow, Enforcement Manager, Charlotte District Office, EEOC, telephone interview, Apr. 14, 1998 (hereafter cited as Witlow interview).

[40] Viramontes interview, p. 3.

[41] Raul Greene, Investigator, San Diego Area Office, EEOC, telephone interview, Apr. 15, 1998 (hereafter cited as Greene interview).

[42] Lillie Wilson, Investigator, Dallas District Office, EEOC, telephone interview, Apr. 14, 1998 (hereafter cited as Wilson interview).

[43] Jim Wallace, Enforcement Supervisor, Dallas District Office, EEOC, telephone interview, Apr. 14, 1998, p. 3 (hereafter cited as Wallace interview).

[44] Cheryl Mabry-Thomas, Investigator, Chicago District Office, EEOC, telephone interview, Apr. 14, 1998 (hereafter cited as Mabry-Thomas interview).

[45] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 42.

[46] Ibid.

Intake varies in other ways as well. The coordination of interviews, information provided, and time spent with charging parties differs among field offices. In Dallas, people who come to the office are handled on a first come, first served basis. Charges are not taken over the phone. Sometimes potential charging parties can make an appointment if the office is very busy, but the wait is usually only 15 to 20 minutes. However, a charging party is usually interviewed as soon as he or she has filled out the paperwork. Interviews may also be scheduled in advance. During the intake interview, the investigator reviews the questionnaire that the charging party has completed (form 283).[48]

In Charlotte, potential charging parties also are served on a first come, first served basis. The office does telephone interviews for charging parties who cannot go to the office. Potential parties fill out a preinterview form and are interviewed by a supervisor before meeting with an investigator for an indepth interview. Investigators try to find out as much as possible during the interview. What is asked depends on the issues and bases the potential charging party raises during the interview.[49]

In Chicago, potential charging parties are shown a videotape while they wait for their interview. When they meet with the investigator, the investigator describes the intake and investigation processes and informs the charging parties of their rights. The investigator will assess the strengths and weaknesses of the case and informs the charging party of what will happen if EEOC takes the charge.[50] A videotape is also shown in the Los Angeles District Office, which has no appointment system. Charging parties sign in and are given an information package that describes the interview, the investigation process, their rights, and the mediation program. After the charging party has completed a questionnaire, he or she is interviewed.[51] The New York District Office has an appointment system for intake interviews, but generally, approximately 30 people come to the office daily who have not made an appointment. However, previously there was no appointment system so persons coming in to file a charge often had a long wait before their interview.[52] The New York office also receives approximately 70 phone calls per day. An investigator in this office stated that much prescreening is done over the telephone.[53]

In the Boston Area Office, a potential charging party is given a questionnaire to complete before the intake interview. The investigator reviews the questionnaire before talking to the charging party. An investigator in this office said that individuals often do not know what EEOC does, so investigators describe the mission of EEOC and the laws it enforces. They then discuss the issue in more detail. If there are sufficient facts a charge will be drafted along with an affidavit, a copy of which will be sent to the employer.[54]

An investigator in the Oklahoma Area Office stated that during an investigative unit's (comprised of three investigators) 2-week intake period, 60 appointments are scheduled, although only about 30 appointments are kept. In addition, about 120 phone calls per investigator are received, approximately one-quarter of which result in charges of discrimination. Other telephone callers ask about their rights, EEOC's responsibilities, and time limits to file claims under various statutes. Other individuals seek clarification on the statutes enforced by EEOC. Many of the callers present issues outside of EEOC's jurisdiction. Most telephone inquiries last between 2 to 30 minutes. During each intake period, staff also receives more than 40 letters from prospective charging parties. Investigators mail a questionnaire to the 8–10 individuals whose letters raise issues that might result in charges under the ADA.[55]

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[47] Ibid.

[48] Wilson interview.

[49] Witlow interview.

[50] Mabry-Thomas interview.

[51] Viramontes interview, p. 4.

[52] Kevin Berry, Enforcement Manager, New York District Office, EEOC, telephone interview, Apr. 15, 1998 (hereafter cited as Berry interview).

[53] Rachel Fleming, Investigator, New York District Office, EEOC, telephone interview, Apr. 9, 1998 (hereafter cited as Fleming interview).

[54] Devika Dubey, Investigator, Boston Area Office, EEOC, telephone interview, Apr. 9, 1998 (hereafter cited as Dubey interview).

The March 1998 joint task force report recommended that the Office of Field Programs coordinate the information provided to charging parties. All videos, foreign language materials, and brochures should be made available to all offices. The report further recommended that the Office of Field Programs, the Office of General Counsel, and the Office of Communications and Legislative Affairs assess information needs and determine what should be developed centrally for distribution to field offices.[56]

Staff interviewed by the Commission said that intake of ADA charges does not differ greatly from intake of charges filed under other statutes; however, there are some differences. An enforcement supervisor in Dallas stated that if a person has a disability that is not apparent, staff gives that person the "ADA Letter" which tells the charging party that EEOC must receive written medical information from a physician that explains what the disability is and how it rises to the level of a disability that substantially limits a major life activity. The charging party is given 30 days to provide this information. Such cases are usually categorized as B cases, pending the receipt of medical information. It is the responsibility of the charging party to provide that information. EEOC will dismiss the case if the information is not received.[57]

An investigator in the Chicago District Office stated that with an ADA case, staff must first determine if the person's disability falls under the ADA. Staff asks charging parties to sign medical release forms to get more information on the disability. Thus, the decision of whether the person is covered under the ADA usually is not made during the intake interview.[58] Similarly, an interviewer in the Charlotte office stated that medical information and/or verification might be required, and that the investigator would have to establish the essential functions of the job during the investigation.[59] The enforcement manager in the New York District Office said that sometimes a disability is apparent (such as when a person is in a wheelchair), but in other cases further research may be needed. For example, the investigator may wish to interview witnesses to determine the nature of the disability.[60]

Charge Categorization

A, B, and C Charges

The Priority Charge Handling Procedures empowered front-line employees to categorize charges, with supervisory review.[61] During the intake interview, EEOC staff makes a determination of whether the charge falls under category A, B, or C. In addition, the joint report of the Priority Charge Handling Task Force and the Litigation Task Force identifies two categories of A cases. An A–1 case is a potential litigation vehicle. An A–2 case is one in which the investigation will likely reveal a cause finding, but the case probably will not be litigated by EEOC.[62]

Many field offices have categorized A, B, and C cases even further. For example, the Charlotte District Office has two categories for each priority level. According the enforcement manager, A–1 charges are cases in which there has been a egregious violation of the law or that raise class issues or Local Enforcement Plan issues. A–2 charges are cases in which there is enough information to determine that there likely is a violation, but do not raise "impact" issues as do A–1 charges. Charges where the information provided is insufficient to determine whether or not a violation has occurred are labeled B–4 cases; B–5 charges are those that are candidates for alternative dispute resolution. Cases in which it is obvious that there has been no violation of the law are labeled as C–6 charges. Cases in which it appears

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[55] Valentine interview, p. 2. *See also* Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, July 17, 1998, Comments of the EEOC, p. 2 (hereafter cited as EEOC Comments, July 17, 1998).

[56] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 42.

[57] Wallace interview.

[58] Mabry-Thomas interview.

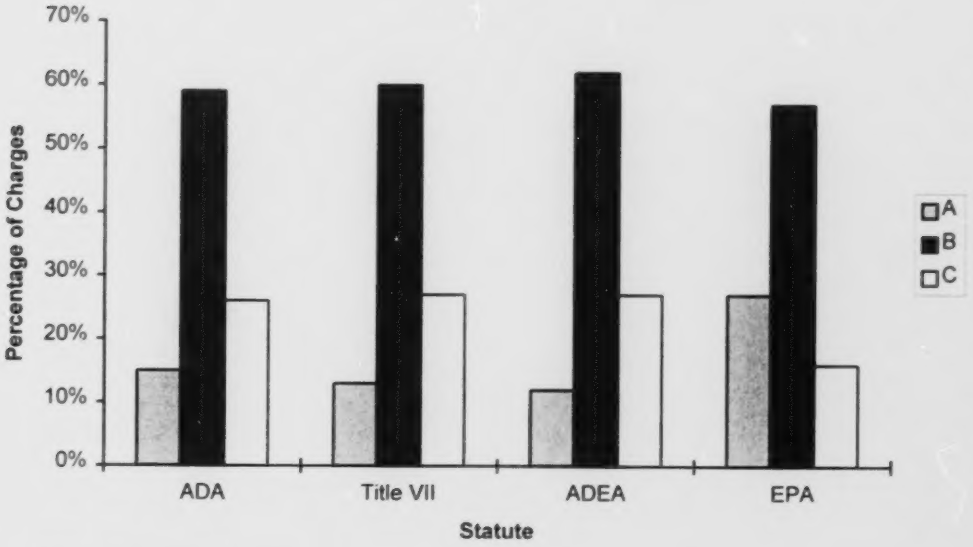
[59] Tiara Jackson, Investigator, Charlotte District Office, EEOC, telephone interview, Apr. 16, 1998 (hereafter cited as Jackson interview).

[60] Berry interview.

[61] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 44.

[62] Ibid., p. 46.

FIGURE 6.1
Processing Category by Statute



Source: EEOC, Charge Data System.

unlikely that a violation occurred, although the charging party has presented sufficient information to file a charge, are labeled C–7.[63]

Essentially, charges for which charging parties provide only partial information (so that investigators are not sure if it is likely that a violation took place) are categorized as B charges.[64] B cases are investigated until enough information is gathered so that they can be reclassified as A or C.[65] There is no need to investigate C charges. Before the new procedures, such cases had to be investigated, even though staff knew these charges had no merit.[66] In Dallas, for C cases that are dismissed during intake, the charging party is given a right to sue letter during the interview.[67]

Many staff indicated that under the new procedures there is better screening of charges, and staff can be honest with charging parties about the prospects and validity of their cases.[68] An enforcement manager in the Charlotte District Office stated that since the new procedures were implemented, staff can act more expeditiously on cases and can identify cases with potential to begin working on them more quickly than before.[69] According to the Chicago district director, charge prioritization is not new to that office, which began categorizing charges as priority "1," "2," or "3" in June 1994. The Chicago office focused on thorough interviews to enable staff to determine the merit of the charge. Both before and after the introduction of the Priority Charge Handling Procedures, staff spent between 2 and 3 hours in intake interviews. However, the district director stated that he is not comfortable stating that staff are capable of making a determination of the priority of a charge. Thus, supervisors also are involved in charge categorization.[70]

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[63] Witlow interview, p. 5.

[64] *See* Wilson interview, p. 3.

[65] Viramontes interview, p. 5.

[66] Ibid.

[67] Wilson interview.

[68] *See* Berry interview; Greene interview; Thelma Taylor, District Director, Los Angeles District Office, EEOC, telephone interview, Apr. 16, 1998.

[69] Witlow interview, p. 1.

The March 1998 joint task force report noted some problems with charge categorization. For example, the Charge Data System data indicate that C charges are not always dismissed at intake. The report stated that sometimes investigators think they need additional information before they can categorize charges as C charges. The task forces also noted an imbalance in the identification and processing of B cases. According to the report:

> Despite innovative approaches taken by some offices to ensure that B charges are recategorized in a timely manner, many offices do not have a system of case management or processing procedures in place to ensure the continuous movement, development and/or resolution of the aging B cases. One factor contributing to the build-up of the B inventory in some offices is a hesitancy on the part of investigators to recategorize a case as a C or as an A.[71]

To resolve these problems, the task forces recommended that C cases be disposed of as soon as possible, and that those offices with an aging B case inventory implement measures to ensure the movement of B cases through the investigative process. The task forces also recommended that field offices develop standard operating procedures for processing B cases.[72]

Differences in categorization of cases by statute are shown below in figure 6.1. For all four statutes enforced by EEOC, close to 60 percent of the charges are placed in category B. Category A and category C charges are distributed similarly for the ADA, title VII, and Age Discrimination in Employment Act (ADEA). Twenty-six percent of ADA charges and 27 percent of both title VII and ADEA charges are placed in category C. Only 16 percent of Equal Pay Act (EPA) charges are categorized as C. Category A charges account for 15 percent of ADA charges, 13 percent of title VII charges, 12 percent of ADEA charges, and 27 percent of EPA charges.

Data from EEOC's Charge Data System suggest that the Priority Charge Handling Procedures have been implemented differently across EEOC's field offices. Table 6.1 shows that the offices vary greatly in the percentage of charges classified as A, B, and C. For example, the percentage of the categorized charges assigned category A varies from 6.2 percent in the Birmingham and San Antonio District Offices to 46.4 percent in the New Orleans District Office. Only 2.9 percent of the cases handled by the El Paso Area Office are category A charges. Similarly, category C charges range from 4.9 percent of the categorized charges in the Indianapolis District Office to 48.1 percent of the categorized charges in the Dallas District Office. In most offices, more than two-thirds of the categorized charges are B charges.

The categorization of charges has received criticism. The director of Golden State University's Employment Rights Clinic stated that practitioners do not understand clearly the prioritization system and do not know if they can influence the decision process. Further, the director stated that categorizing cases at intake is problematic because charging parties may not know how to frame their charge so that the important legal facts are made clear. Similarly, intake personnel may not be able to determine if there are bases for discrimination other than as described by the charging party.[73]

Commissioner Charges

The *EEOC Compliance Manual* provides for the investigation of Commissioner charges in which "[r]espondents may be identified and scheduled for investigation either in the absence of an individual charge or when the bases/issues to be investigated are not adequately covered by a pending charge."[74] According to the manual:

> While the principal means for implementing Commission policy is the investigation of individual charges, EEOC initiated investigations are a necessary part of the enforcement process. Discrimination victims are

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[70] Rowe interview, pp. 2–3.

[71] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 48.

[72] Ibid., pp. 44, 48.

[73] "EEOC Officials, Attorneys See Improvements With Charge, Litigation Processing Changes," *Daily Labor Report*, Bureau of National Affairs, Mar. 30, 1998, p. C–1.

[74] EEOC, *EEOC Compliance Manual*, published by the Bureau of National Affairs, § 8.1, p. 8:0001 (hereafter cited as EEOC, *Compliance Manual*).

TABLE 6.1
Priority Charge Processing, by Office

	Number of charges				Percentage of charges		
Office	**A**	**B**	**C**	**Total charges**	**A**	**B**	**C**
Albuquerque	153	703	200	1,056	14.5	66.6	18.9
Atlanta	412	1,641	444	2,497	16.5	65.7	17.8
Savannah	41	238	62	341	12.0	69.8	18.2
Baltimore	405	559	351	1,315	30.8	42.5	26.7
Norfolk	149	256	91	496	30.0	51.6	18.3
Richmond	179	416	295	890	20.1	46.7	33.1
Birmingham	105	1,071	527	1,703	6.2	62.9	30.9
Jackson	116	411	248	775	15.0	53.0	32.0
Charlotte	515	898	472	1,885	27.3	47.6	25.0
Raleigh	125	333	176	634	19.7	52.5	27.8
Greensboro	98	164	126	388	25.3	42.3	32.5
Greenville	88	124	54	266	33.1	46.6	20.3
Chicago	494	2,855	436	3,785	13.1	75.4	11.5
Cleveland	290	830	1,178	2,298	12.6	36.1	51.3
Cincinnati	145	657	248	1,050	13.8	62.6	23.6
Dallas	469	867	1,236	2,572	18.2	33.7	48.1
Oklahoma	102	519	491	1,112	9.2	46.7	44.2
Denver	313	1,370	932	2,615	12.0	52.4	35.6
Detroit	274	1,112	1,142	2,528	10.8	44.0	45.2
Houston	458	1,915	627	3,000	15.3	63.8	20.9
Indianapolis	399	3,269	187	3,855	10.4	84.8	4.9
Louisville	129	877	140	1,146	11.3	76.5	12.2
Los Angeles	254	796	714	1,764	14.4	45.1	40.5
San Diego	80	972	462	1,514	5.3	64.2	30.5
Memphis	167	648	210	1,025	16.3	63.2	20.5
Little Rock	183	812	296	1,291	14.2	62.9	22.9
Miami	463	2,251	700	3,414	13.6	65.9	20.5
Tampa	284	1,263	600	2,147	13.2	58.8	27.9
Milwaukee	142	1,605	492	2,239	6.3	71.7	22.0
Minneapolis	89	1,097	377	1,563	5.7	70.2	24.1
Nashville	175	1,075	327	1,577	11.1	68.2	20.7
New Orleans	490	434	132	1,056	46.4	41.1	12.5
New York	251	1,109	711	2,071	12.1	53.5	34.3
Boston	116	774	561	1,451	8.0	53.3	38.7
Buffalo	203	634	169	1,006	20.2	63.0	16.8
Philadelphia	776	1,346	426	2,548	30.5	52.8	16.7
Newark	189	610	123	922	20.5	66.2	13.3
Pittsburgh	505	1,693	70	2,268	22.3	74.6	3.1
Phoenix	655	1,095	874	2,624	25.0	41.7	33.3
St. Louis	146	915	605	1,666	8.8	54.9	36.3
Kansas City	155	835	389	1,379	11.2	60.6	28.2
San Antonio	126	1,607	303	2,036	6.2	78.9	14.9
El Paso	27	824	77	928	2.9	88.8	8.3

TABLE 6.1 (continued)
Priority Charge Processing, by Office

	Number of charges				Percentage of charges		
Office	**A**	**B**	**C**	**Total charges**	**A**	**B**	**C**
San Francisco	195	753	494	1,442	13.5	52.2	34.3
Fresno	21	209	88	318	6.6	65.7	27.7
Oakland	60	234	529	823	7.3	28.4	64.3
San Jose	65	178	155	398	16.3	44.7	38.9
Honolulu	40	100	44	184	21.7	54.3	23.9
Seattle	254	579	386	1,219	20.8	47.5	31.7
Washington	230	476	386	1,092	21.1	43.6	35.3
Headquarters	2	136	6	144	1.4	94.4	4.2
FEPA/Other	44	271	27	342	12.9	79.2	7.9
Totals	11,846	46,416	20,396	78,658	15.1	59.0	25.9

Source: EEOC, Charge Data System

> often either unaware of their rights or unaware of discriminatory practices. While this is typically so in cases of systemic discrimination, it is also true in cases where discrimination is less pervasive. Field offices should not hesitate to recommend commissioner charges or initiate directed investigations as a complement to individual charge investigations when such action will fulfill EEOC's law enforcement mission.[75]

The Priority Charge Handling Procedures stress that Commissioner charges are an essential component of EEOC's law enforcement strategy.[76] The procedures state that "some types and incidents of illegal discrimination will not be the subject of individual charges but, nonetheless, constitute serious violations of the laws that should be the subject of enforcement action" and offer examples of such instances.[77] The procedures for Commissioner charges allow field offices to submit proposed charges directly to the Commission, rather than seeking approval from the Office of Program Operations (now called the Office of Field Operations) and to investigate these charges without headquarters supervision.[78]

Commissioner charges may also be proposed by outside organizations and/or individuals.[79] In response to an information request for this report, the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities provided an example of a request for a Commissioner charge. In the request, the general counsel for the State agency said that he was asking for a Commissioner charge because the agency did not have the authority to investigate without a specific request from an individual, nor did it have jurisdiction beyond the State border. The request further stated that "the information provided to the EEOC may lead to the conclusion that the issues are national in scope and dimension, and not unique to one State or EEOC."[80]

Acting Chairman Igasaki has stated that Commissioner charges are an important tool for eliminating discrimination. These charges can be used in cases where there are witnesses but no formal charge filed, or where there is fear of reprisal. According to Acting Chairman Igasaki,

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[75] Ibid., § 8.1 (a), p. 8:0001.

[76] The procedures also apply to "directed investigations," which are investigations initiated by EEOC staff under the Age Discrimination in Employment Act or the Equal Pay Act. EEOC, "Priority Charge Handling Procedures," p. 17.

[77] Ibid.

[78] Ibid., p. 19.

[79] EEOC, *Compliance Manual*, § 8.2, p. 8:0001.

[80] Lawrence Berliner, General Counsel, State of Connecticut, Office of Protection and Advocacy for Persons with Disabilities, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, enclosure.

Commissioners are restrained with the charges because they have to sign them.[81] Commissioner Reginald E. Jones stated that he only signs a Commissioner charge if he believes that there is a good reason for an investigation. He noted that a Commissioner charge triggers only an investigation.[82] Commissioner Paul Steven Miller indicated that Commissioner charges are a necessary part of strategic enforcement; EEOC must choose cases that will have national impact.[83]

Commissioner charges also have received support from the National Partnership for Women and Families. Speaking before the House Subcommittee on Employer-Employee Relations, the director of Legal and Public Policy stated that Commissioner charges are an important tool. Victims of discrimination may be afraid to file a charge with EEOC, or may not even realize they are being treated unfairly because they have no basis of comparison. Thus, Commissioner charges "can help ferret out egregious discrimination that would otherwise go unremedied."[84]

Others have questioned the use of Commissioner charges. For example, in testimony before the House Subcommittee on Employer-Employee Relations, House Speaker Newt Gingrich asked, "Why go out seeking discrimination haphazardly when it can be said that it is sitting on your doorstep?" Although the Speaker acknowledged that Commissioner charges are not necessarily "frivolous and unworthy of support," he stated that there are other obvious cases of discrimination that must be addressed.[85]

Commissioner charges account for only a small proportion of all charges filed with EEOC. Data received from EEOC indicate that only 99 ADA charges have been commissioner charges. Of all charges filed between October 1989 and September 1997, 559 were Commissioner charges, less than 1 percent of the total.

Charge Investigation

Investigations

The investigation of a charge is designed to give EEOC the information necessary to determine if there is reasonable cause to believe that discrimination has occurred. EEOC's investigative staff generally issues a request for information to the respondent employer. Once a response has been obtained from the employer, EEOC's staff decides how to proceed. EEOC can go onsite to investigate employers, during which EEOC's investigative staff can examine the employer's records and interview witnesses. EEOC has the authority to issue a subpoena to obtain access to the information necessary for reaching a determination on a charge.[86] During the investigation, an EEOC investigator can help the parties reach a settlement, although the investigator must remain neutral during the parties' negotiations.[87]

According to the Director of the Office of Field Programs, a case gets as much investigation as is needed. The investigation is completed when a cause finding is found or when the investigator determines that additional information will not lead to a cause finding.[88] All cases in category A are investigated. The Priority Charge Handling Procedures specify that "the investigation to be made in each case should be appropriate to the particular charge, taking into account the EEOC's resources."[89] EEOC field offices are to "develop a flexible process" to ensure that charges that have little merit are not "over investigated." The procedures direct investigators to decide, as soon as possible after receiving a response to their request for information from the respondent, whether to dismiss the charge, to investigate further, or pursue a settlement. The Priority Charge Handling Procedures emphasize that investigators should continually reassess and recategorize charges as they gather more information.[90]

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[81] Paul M. Igasaki, Acting Chairman, EEOC, interview, Apr. 7, 1998, p. 2 (hereafter cited as Igasaki interview).

[82] Reginald E. Jones, Commissioner, EEOC, interview, Apr. 1, 1998, p. 3 (hereafter cited as Jones interview).

[83] Paul Steven Miller, Commissioner, EEOC, interview, Apr. 2, 1998, p. 3 (hereafter cited as Miller interview).

[84] Norton testimony, p. 3.

[85] *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. 4 (Mar. 3, 1998) (statement of Newt Gingrich, Speaker of the House, U.S. House of Representatives) (hereafter cited as Gingrich testimony).

[86] Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, pp. 0:3302–0:3307.

[87] Ibid., p. 0:3501.

[88] Elizabeth Thornton, Director, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 1, 1998, p. 3.

[89] EEOC, "Priority Charge Handling Procedures," p. 9.

The Priority Charge Handling Procedures offer "management options" for reducing the backlog of cases and for improving the coordination between investigators and attorneys. The procedures offer a number of suggestions as to what field offices can do, at their discretion, to reduce their backlogs. For instance, the procedures suggest that field offices may give backlogged charges priority or devote an entire week to older cases.[91]

The new procedures also stress the need for attorneys to be involved in the classification and investigation stages and suggest organizing investigator-attorney teams or "other collaborative arrangements" to accomplish this.[92] This need has been identified by those outside of EEOC as well. For example, the Chairman of the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce stated that attorneys should provide greater supervision over intake and investigation.[93] Similarly, the Speaker of the House stated at the same hearing that lawyers must be more involved in intake and investigation and less involved in litigation.[94]

The joint report of the Priority Charge Handling Task Force and the Litigation Task Force noted the importance of cooperation between investigative and legal units. The report stated:

> Prior to the implementation of the PCHP [Priority Charge Handling Procedures], the NEP and the LEPs, there was often considerable pressure on investigators to focus on case closure at the expense of cause development and litigation. In addition, approximately 85% of the agency's litigation docket consisted of cases on individual charges. While individual cases should be part of a diversified docket, the limited scope of these charges meant that they could not be developed into cases that would advance the law, affect broad discriminatory patterns or practices or provide relief in cases involving large numbers of people.[95]

However, attorney involvement in investigations continues to vary among the field offices. According to the joint task force report:

> in some offices, there still exists a culture where finger-pointing is the response to concerns about office enforcement results. . .we heard from some staff that the investigations unit was to blame for the lack of litigation because investigators need training and focus primarily on resolutions, or that legal does not adequately support the investigation of cause cases and does not respect the work of investigators.[96]

The Director of the Office of Field Programs stated that investigators and attorneys are working well together; the form of coordination depends on the office culture.[97] However, in his March 19, 1998, report to the EEOC Commissioners, the General Counsel stated that improvement in attorney-investigator relations was needed.[98]

Field offices have experimented with different forms of attorney-investigator interaction. Several offices have developed "hybrid" units that have both investigative and legal staff. In some offices, investigators and attorneys report to the same supervisor. In other offices, an attorney is assigned to an investigative unit to assist in investigations.[99] The Director of Field Management Programs stated that the requirement of greater coordination between investigators and attorneys is an "ongoing process."[100]

Several EEOC staff members provided examples of legal staff involvement in investigations. A trial attorney in the Dallas District Office stated that she reviews charges that have been categorized as A or B charges, but usually does not review C charges.[101] A trial attorney in Charlotte stated that since the implementation of the Priority Charge Handling Procedures, she works more closely with investigators, and at an earlier stage. She is assigned to an investigative unit to provide advice as needed. Legal staff in the Charlotte District Office review all A charges and some B charges.[102] In the New York District Office, attorneys are assigned to work with each investigative unit in the office and the area offices they serve (Boston and Buffalo). They coordinate their efforts with the supervisors of the investigative units and help to identify the cases to which they want to give the highest priority. Trial attorneys review category A charges and some category B charges if they find that the number of A charges is low and they believe there may be more.[103]

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[90] Ibid., pp. 9–10.

[91] Ibid., pp. 15–16.

[92] Ibid., pp. 15–16.

[93] *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. (Mar. 3, 1998) (statement of Harris W. Falwell, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives).

[94] Gingrich testimony.

[95] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 13.

[96] Ibid., p. 14.

[97] Thornton interview, p. 2.

[98] Report on EEOC Commission Meeting, Mar. 19, 1998, p. 3.

[99] Ibid., p. 1. *See* EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 46.

[100] Godfrey Dudley, Director, Field Management Programs, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 7, 1998, p. 2.

According to the enforcement manager in Charlotte, investigations in that office are done by two enforcement units, with varying participation by legal staff. The A–1 enforcement group is comprised of teams: the A–1 team, a class team, and a South Carolina team. Each team has attorneys who are involved in the investigation from beginning to end. These teams investigate charges that have potential litigation and some A–2 charges. In the A–2 enforcement group, which investigates A–2 charges and B charges, attorneys are available as counselors, but are only involved at the end of an investigation.[104]

Processing time also varies from office to office. The enforcement manager in the Charlotte District Office stated that A cases normally are assigned to investigators within 3 to 4 weeks. B cases may take up to 6 weeks to become an active investigation.[105] An investigator in the Boston Area Office stated that an investigation begins about 2 months after the intake interview occurs.[106] An investigator in the San Diego Area Office also stated that it takes about 2 months for active investigation of a case to begin. He explained that the delay is due to the backlog of cases. Each investigator has approximately 70 charges from the backlog to resolve.[107]

Throughout the investigation, charging parties are kept informed of the progress of the case in a variety of ways. Investigators may contact the charging party at certain points, when they wish to review certain information, or when more information is needed. Charging parties also may call the investigator for an update on the status of the case.[108] Respondents are provided a copy of the charge to which they can respond, but neither the charging party nor the respondent is provided access to the investigative file.[109]

In a review of EEOC's charge processing efforts, one researcher noted problems with the investigative process. The researcher charged, "There has been an incentive for investigators to find that 'there is not reasonable cause to believe that a charge is true.'" The researcher noted that during her review (September 1995 to September 1996), investigators were rated on the number of cases they closed, not the quality of their investigations.[110] The researcher also found that onsite investigations and in-person interviews were rarely done because of time and resource limitations, "boilerplate" request for information letters were commonly used, and information from respondents was not verified.[111]

EEOC investigators interviewed for this report only partially confirm these allegations. Investigators stated that there are standardized requests for information, although many investigators do modify them to apply to a particular charge.[112] Investigators also noted that information received from respondents is confirmed with supporting documentation or through interviews.[113] However, one investigator noted that unless there is reason to question the credibility of respondent-provided information, an investigator will continue the investigation assuming what each side has told and provided to EEOC is true.[114] Further, the enforcement manager in the Dallas District Office stated that onsite investigations often are not done at respondent's sites outside of the Dallas area, due to the large geographical area covered by the office and a limited travel budget.[115]

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[101] Costas interview, p. 1.

[102] Lynette Barnes, Trial Attorney, Charlotte District Office, EEOC, telephone interview, Apr. 15, 1998, pp. 2–3.

[103] James Lee, Regional Attorney, New York District Office, EEOC, telephone interview, Apr. 8, 1998, p. 2.

[104] Witlow interview.

[105] Ibid., p. 6.

[106] Dubey interview, p. 4.

[107] Greene interview.

[108] *See* Wallace interview, pp. 4–5.

[109] Ibid., p. 5; Mabry-Thomas interview, p. 5; Dubey interview, pp. 4–5.

[110] Kathryn Moss, "Psychiatric Disabilities, Employment Discrimination Charges, and the ADA," report prepared for U.S. Department of Education, Office of Special Education and Rehabilitative Services, National Institute on Disability and Rehabilitative Research, Sept. 30, 1995—Sept. 28, 1996, pp. 19–20.

[111] Ibid., pp. 18–19.

[112] *See* Wilson interview, p. 4; Witlow interview, p. 6; Taylor interview, p. 4; Valentine, p. 5.

Determinations

The Priority Charge Handling Procedures state that substantive no cause determinations will no longer be issued. Charging parties will be provided a "short-form" determination stating that the investigation failed to disclose a violation, using the standard language:

> Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issue that might be construed as having been raised by this charge.[116]

The procedures state that because the determination no longer explains in detail the disposition of the charge, determination counseling is critical. The procedures provide four options for communicating the reasons for the determination to the charging party: in-person interview, telephone or conference call, written statement, and referrals to a private attorney, civil rights organization, or advocacy organization. Offices are free to adapt the options or develop alternative ways of communicating the reasons for the determination.[117]

Most offices attempt to inform the charging party by telephone when a no cause determination is made. In the Charlotte District Office, the charging party is given 5 days to provide additional information; then the case is dismissed.[118] The regional attorney for the Los Angeles District Office stated that issuing a "no cause" finding would be misleading because it would suggest that EEOC had investigated. Thus, a standard letter of determination is issued. However, the charging party is notified of the reasons for the determination either by telephone or in writing. The regional attorney added that the Los Angeles District Director is quite open to reconsidering cases because they do not do a full investigation, and thus there is room for error.[119]

The 1998 joint task force report noted that some offices do not consistently do determination counseling to inform charging parties of the reasons for a determination. The task forces recommended that field offices should improve communications with charging parties and respondents and "work towards the agency's goal of open and full disclosure of [its] procedures and decisions."[120] Further, the task forces recommended that "[f]ield offices should continue to exhibit independence and creativity in their Determination Interview techniques, as long as these techniques are consistent with the mandate of the [Priority Charge Handling Procedures]."[121]

There are no formal procedures for charging parties to request reconsideration of their cases.[122] However, the Priority Charge Handling Procedures state that although EEOC has no statutory requirements to reconsider determinations, district office directors may consider such requests if the charging party presents new evidence or a persuasive argument that the decision was wrong. The procedures state that offices should reconsider determinations only if one of three conditions has been met: misconduct by EEOC staff, presentation of substantial new evidence, or an error in interpretation of the law.[123]

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[113] *See* Wilson interview, p. 4; Dubey interview, p. 4.

[114] Mabry-Thomas interview, p. 5.

[115] Wallace interview, p. 4.

[116] EEOC, "Priority Charge Handling Procedures," p. 11.

[117] Ibid., p. 12.

[118] Witlow interview.

[119] Pamela Thomason, Regional Attorney, Los Angeles District Office, EEOC, telephone interview, Apr. 14, 1998, p. 4 (hereafter cited as Thomason interview).

[120] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 49.

[121] Ibid.

[122] EEOC, "Priority Charge Handling Procedures," p. 12. *See also* Rowe interview.

[123] EEOC, "Priority Charge Handling Procedures," pp. 12–13.

Charge Resolutions and Closures

Settlements and Conciliations

The Priority Charge Handling Procedures state that settlement is "an important enforcement option."[124] A predetermination settlement is the process of resolving a case before EEOC determines if discrimination occurred.[125] The procedures outline different principles for determining whether to settle a case, depending on the category of the charge. Charges in category A that do not fall within the NEP or the relevant LEP may be settled at any time by the investigators, with or without consulting the legal staff. Category A charges that do fall under the NEP or LEP may be settled at any time in consultation with the regional attorney. Category C charges will not be settled by EEOC.[126]

EEOC's Charge Processing Task Force recommended rescinding EEOC's former policy, "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination," which was issued in 1985. To encourage settlements, the task force called for giving field offices the discretion to determine appropriate relief for each charge.[127] In April 1995, the Commission approved this recommendation by adopting a motion permitting EEOC to accept settlements providing "substantial relief" in cases where a violation likely occurred and "appropriate relief" at an earlier stage in the investigation.[128] The Priority Charge Handling Procedures encourage settlement where "amicable resolution" is possible, but caution against imposing a settlement merely to close a case.[129]

When a cause determination is made, the investigator attempts to conciliate the case. The regional attorney in the San Francisco District Office stated that respondents have the opportunity to conciliate a claim at any point in the investigative process, but once EEOC decides to litigate, conciliation is not an option. The director of the Women's Employment Rights Clinic at Golden State University stated that conciliation is difficult because respondents are not provided access to EEOC's investigative file.[130] EEOC considers the investigative file to be confidential, although staff has indicated that respondents are given the information they need to respond to a charge of discrimination.[131]

The March 1998 joint task force report states that after implementation of the Priority Charge Handling Procedures the number of predetermination settlements decreased, while the monetary relief acquired from such settlements increased. Comparatively, both the number of conciliations and the dollar amount acquired in conciliations increased.[132] The report also noted that although most field offices have accepted the focus on settlements, some offices have acknowledged that their focus has been on developing A cases and reducing the inventory. Thus, the task forces recommended that "[f]ield offices should initiate settlement discussions at all appropriate stages of the investigative enforcement process to resolve cases."[133]

Alternative Dispute Resolution

Alternative dispute resolution (ADR) has been touted as one way to improve EEOC's charge processing, particularly by reducing the time it takes for EEOC to resolve complaints. For instance, the associate director of the State of Illinois Department of Rehabilitation Services wrote:

> Alternative Dispute Resolution (ADR) could dramatically change the way that ADA complaints are dealt with and the time frame involved. By setting up Alternative Dispute Resolution Centers in each state (more than one in larger states), the time frames could be lowered and become more acceptable. The present method of investigating each complaint and then issuing right to sue letters is ineffective and does not work. If the federal government gave [persons with disabili-

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[124] Ibid., p. 10.

[125] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 49. A "mediated settlement" is the result of a case that has been mediated through the alternative dispute resolution (ADR) program. Ibid. Cases referred to the ADR program are not investigated.

[126] EEOC, "Priority Charge Handling Procedures," p. 11.

[127] EEOC, "Charge Processing Task Force Report," p. 7.

[128] *See* EEOC, "Priority Charge Handling Procedures," p. 3.

[129] Ibid., p. 10.

[130] "EEOC Officials, Attorneys See Improvements with Charge, Litigation Processing Changes," *Daily Labor Report*, Bureau of National Affairs, Mar. 30, 1998, p. C–1.

[131] *See* Wallace interview, p. 5; Mabry-Thomas interview, p. 5; Dubey interview, pp. 4–5.

[132] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 50.

[133] Ibid.

> ties] a choice of waiting for two years while EEOC. . .investigated their complaint or having ADR, [more persons with disabilities] would choose ADR.[134]

The Task Force on Alternative Dispute Resolution was assigned the responsibility of assessing whether alternative dispute resolution should be used at the agency.[135] Under an ADR program, mediation would take place after charge assessment and before any further investigation is performed.[136] Mediation is defined as:

> a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties *themselves* reach what they consider to be a workable solution.[137]

The difference between the settlement negotiations and conciliation EEOC has used traditionally and mediation under the ADR is that in mediation, EEOC has made no determination. Mediation allows the involved parties to develop solutions, without having a third party impose a solution. The ADR Task Force proposed a mediation model whereby the charging party and respondent meet with a neutral third party to resolve their differences.[138] Under the task force proposal, once the mediator determines the nature and scope of the dispute, the mediator can work with the involved parties to reach an acceptable resolution. If an agreement is reached, the mediator draws up the terms of the agreement. However, if a resolution cannot be reached, the mediator is to notify EEOC, and the complaint is processed through the traditional investigative enforcement channels.[139]

In 1994, before the release of the task force report, EEOC completed implementation of an ADR pilot program.[140] The program was designed to determine if charges of employment discrimination could be resolved more quickly and effectively using mediation than by relying solely on investigations.[141] In the pilot program, which was conducted in four district offices, mediation was offered to the parties as an alternative for resolving charges of discrimination. The program showed that, in appropriate circumstances, mediation was an effective method of early resolution for some types of charges.[142] The task force concluded that ADR works better (both parties are receptive) when there is an ongoing relationship between the parties (the charging party has not been terminated).[143]

The ADR task force emphasized that for mediation to work, all mediators would need to undergo EEOC training. The task force also recommended that each field office be given a new supervisory ADR administrator position at the GS–13 level. The ADR administrator would oversee the office's mediation program, including recruiting and training mediators. The task force emphasized that the credibility of the program would depend on the qualifications and training of the mediators.[144]

In 1995, at a symposium on civil rights, Rosalie Gaull Silberman, then EEOC Commissioner and Vice Chairman and one of the members of the task force, spoke on the use of alternative dispute resolution in ADA charges:[145]

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[134] Suter letter, attachment, p. 3.

[135] EEOC, "Task Force on Alternative Dispute Resolution: Report to Chairman Gilbert F. Casellas," Mar. 5, 1995, p. 2 (hereafter cited as EEOC, "Task Force on Alternative Dispute Resolution Report"). Chairman Casellas appointed three task forces to "chart a course" for the EEOC.

[136] Ibid., p. 6.

[137] Colquitt Meacham, "The Use of Mediation to Resolve Employment Discrimination Complaints," *Boston Bar Journal*, vol. 28, (May/June 1984), p. 22 (citing Cormick, "Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective," *Resolve* (Winter 1982)), as cited in EEOC, "Task Force on Alternative Dispute Report," p. 7.

[138] EEOC, "Task Force on Alternative Dispute Resolution Report," p. 7.

[139] Ibid., pp. 7–8.

[140] The pilot program began in 1992 in four district offices. In the program, more than one-half of the charges mediated were resolved, and the mediations were completed in an average of 67 days. In cases where the charging party was still employed, 48 percent of the respondents chose mediation. Where the charging party was terminated, 39 percent chose mediation. Ibid., p. 5.

[141] EEOC, *FY 1994 Annual Report*, p. 4.

[142] EEOC, *FY 1995 Annual Report*, p. 12.

[143] EEOC, "Task Force on Alternative Dispute Resolution Report," p. 5.

[144] Ibid., pp. 16–18.

[145] *Symposium for the Next Millennium: Evolution of Employment Discrimination Under the Americans with Disabilities Act: The Interaction of the Americans with Disabili-*

> The reasonable accommodation aspects, make ADA disputes particularly appropriate for alternative dispute resolution. Proponents envision reasonable accommodation as an interactive process in which employer and employee come together, reaching a conclusion as to what reasonable accommodation would meet the employee's needs within the construct of the employer's ability to provide that reasonable accommodation. The success enjoyed thus far with ADA can be enhanced by more widespread use of ADR by employers and employees at the Commission.[146]

In April 1995, the Commission adopted the recommendations of the Task Force on Alternative Dispute Resolution for using mediation-based alternative dispute resolution to promote earlier and quicker dispute resolution of charges,[147] and in July 1995, the Commission issued its Policy Statement on Alternative Dispute Resolution which confirmed the EEOC's commitment to use voluntary alternative methods for resolving disputes in all of its activities, including all aspects of the enforcement process.[148]

The EEOC policy statement on ADR identifies four core principles. First, the ADR program must further the mission of the agency. Second, it must ensure fairness for both charging parties and respondents. Thus, the program must be voluntary for the parties involved, a neutral third party must facilitate the process, confidentiality must be maintained, and any agreement reached must be enforceable.[149] Third, the agency's ADR program is to be flexible so that it can respond to the differing challenges faced by the agency and its individual offices. Workload, geographic, and cultural differences must be taken into account. Further, the ADR program must provide for training and evaluation.[150]

The ADR program was to be instituted in EEOC offices nationwide during 1997.[151] The Director of the EEOC St. Louis District Office predicted that about 70 percent of the charges filed with her office would be handled through alternative dispute resolution.[152] She expected that by using ADR, EEOC would resolve discrimination charges more quickly, despite the agency's decreasing resources. The St. Louis office planned to use volunteers who have experience mediating employment discrimination complaints as mediators, since the alternative dispute resolution program does not require that the mediators be attorneys. The office also planned to organize a local advisory panel to make certain that the ADR program is successful.[153] However, the director admitted that EEOC's past experience has been that charging parties are more interested than companies in mediating disputes. She said that companies would have to be convinced to participate in mediation early in the process as an alternative to litigation.[154] She said that with ADR, EEOC would be able to investigate more effectively with the current number of investigators and that persons' rights will not be shortchanged under the new procedures.[155]

Given resource limitations, field offices have been given the freedom to develop their own ADR programs. According to the Director of Field Management Programs, some offices use their own staff as mediators. Some offices are using *pro bono* mediators, for whom EEOC has done training. Still other offices refer to the FEPAs for mediators. A few offices are using law students or students who are earning advanced degrees in ADR. In some offices requests for mediators are referred to a contractor and the employer and/or charging party pay for the mediation. In all cases, charging parties and respondents are informed of the options and are assured that mediation is voluntary.[156]

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ties Act and Alternative Dispute Resolution, Johns J.L. Comm., vol. 10 (Summer 1995), p. 573.

[146] Ibid., p. 586.

[147] EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 5.

[148] EEOC, "National Enforcement Plan," p. 9.

[149] EEOC, "EEOC Policy Statement on Alternative Dispute Resolution," July 17, 1995.

[150] Ibid.

[151] EEOC, "Strategic Plan," p. 12.

[152] "EEOC Office Ready to Implement ADR By End of July, District Director Says," Bureau of National Affairs, *Employment Discrimination Report*, vol. 9 (July 23, 1997), p. 115.

[153] Ibid., p. 116.

[154] Ibid., p. 115.

[155] Ibid., p. 116.

[156] Thornton interview. *See also* Paula Choate, Director, Field Coordination Programs, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 1, 1998 (hereafter cited as Choate interview).

In Los Angeles, for example, charging parties are informed about the ADR program during the intake interview. Most charging parties make a decision about using ADR at the time of intake. The Los Angeles District Office uses four internal mediators and several associations of professional mediators. The office is expanding to use more outside mediation associations. Outside mediators must sign a confidentiality agreement. The outside mediator, the charging party, and the respondent make arrangements to pay the fees associated with mediation, if any; EEOC is not involved in the monetary aspects. Outside mediators are professional mediators with a minimum of 2 years experience. Before they are allowed to mediate EEOC cases, they are given an orientation. All of the investigators in the Los Angeles District Office went to a formal certified mediation training course. In addition, support staff have gone through at least basic mediation training and most of them advanced training.[157]

To ensure confidentiality and neutrality, EEOC staff who are mediators in the Los Angeles District Office are assigned full time to the ADR unit. Although they carried over some cases, they cannot mediate those cases, and after they have completed those cases, they will no longer investigate charges. Further, mediators are not given access to the investigative files of the cases they are mediating. The mediator only receives the information that the respondent and the charging party provide during the mediation, and then that information is destroyed. The investigative file goes to investigators initially. If a case is undergoing mediation, the file is pulled and sequestered, so that an investigation will not take place. The mediator does not communicate with the investigator; they are physically segregated in the office.[158]

The ADR coordinator in Los Angeles said that a respondent or a charging party who has any concerns about integrity can use a private mediator. However, most employers and charging parties use EEOC's program rather than a private program, because the EEOC staff in the Los Angeles District Office are well trained. To ensure that outside mediators are unbiased, the ADR coordinator ensures that the mediators he uses are highly experienced; they have had extensive mediation training and settlement experience. They get additional training on the particular form of mediation EEOC does.[159]

The New York District Office worked with Cornell University to train volunteer mediators. The volunteers are primarily attorneys, professional mediators, and instructors. The 2-day training course covered what EEOC does, the laws EEOC enforces, the charge processing procedures, sample cases, and previous cases and remedies. Approximately 20 volunteer mediators work with the New York District Office, and an additional 19 volunteer mediators work with the Buffalo Area Office.[160] To ensure confidentiality, all parties in the mediation sign confidentiality agreements. Further, investigative files are color coded to alert staff that the case is in the ADR unit.[161]

Charges that are categorized as A or B charges are considered for mediation; C charges are not submitted to mediation. However, some A charges, such as class cases with all parties identified, and charges raising national issues that need to be investigated and decided, also are excluded from the mediation process. For example, a charge of discrimination involving English-only rules or a novel issue relating to immigrants would not be eligible for mediation.[162]

EEOC officials noted that it is often difficult to get employers to use mediation, which leads to a low participation rate. The Los Angeles District Office, for example, has a respondents' acceptance rate of 36 percent.[163] Employers have a variety of reasons why they do not want to use mediation. Some may feel that the charge is meritless; others may not want to spend the time; or others do not understand the process.[164]

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[157] Doug Herrera, Program Analyst, Los Angeles District Office, EEOC, telephone interview, Apr. 13, 1998 (hereafter cited as Herrera interview).

[158] Ibid.

[159] Ibid.

[160] Michael Bertty, ADR Coordinator, New York District Office, EEOC, telephone interview, Apr. 8, 1998 (hereafter cited as Bertty interview).

[161] Bertty interview.

[162] Herrera interview. *See also* Bertty interview; Wallace interview.

[163] That is, of those charging parties who agreed to use ADR, only 36 percent of respondents agreed. Herrera interview.

[164] Ibid.

It is difficult and resource intensive to educate employers and unions about ADR. Unions are just as opposed to mediation as employers are. According to the ADR coordinator in Los Angeles, with additional resources to educate people, there would be more success with ADR. On average, employers must be contacted five times before they say yes or no. Thus, it takes twice as much time to set up a mediation as it takes to complete it.[165]

According to the ADR coordinator, the ADR program in the Los Angeles District Office is advanced relative to those in most other district offices. It is unusual for a district office to have four investigators assigned full-time to the ADR program. In addition, the office can call upon 170 private mediators. Because Los Angeles District Office is understaffed in a number of areas, some people question why the office has four investigators in the ADR unit. According to the ADR coordinator, that would be less of a concern if there was specific funding to support the ADR program.[166]

The average time to mediate and close a charge is about 171 days, less time than it takes to investigate and close a charge. EEOC officials stated that approximately 50 percent of the cases that have gone through mediation have been successful.[167] If mediation is successful, an agreement between the charging party and the respondent is signed. The cases that are successful are usually those in which the employee is still employed. These often involve issues of terms and conditions, failure to promote, or salary. Mediation is less successful when an employee is no longer employed by the company.[168] The Director of Field Coordination Programs noted that ADR may be more successful with the ADA than with other statutes that EEOC enforces because the ADA is a new law, and as employers learn about the ADA and potential violations, they may be willing to resolve issues through voluntary compliance.[169]

The new Priority Charge Handling Procedures and the use of alternative dispute resolution are reinforced in the agency's National Enforcement Plan.[170] The President's fiscal year 1999 budget request to Congress also has embraced the use of alternative dispute resolution by EEOC. The President has requested $13 million to enhance EEOC's ADR program by allowing the agency to hire contract mediators. The President's request notes that EEOC has been forced to use trained investigators as mediators, taking away "scarce investigative resources"[171] from cases that require investigation, and stresses that "EEOC will need to use more experienced and credible mediators in the future."[172] An increase in EEOC's budget for ADR has also received support from Congress. The Speaker of the House stated that increased funding should be provided to EEOC in return for reforms in six areas, including an expanded use of ADR.[173]

In his April 1998 statement before a subcommittee of the House Committee on Appropriations, Acting Chairman Igasaki noted that "[t]his modest effort is receiving praise from employees and employers who have chosen to participate. Participants are impressed with both the efficiency and the quality of the process."[174] He said that given the increase in the number of charges mediated and the benefits received in mediated cases, "a substantive increase in resources will yield significant results and improvements in service."[175]

Experts have noted that ADA disputes are a significant portion of all issues mediated through ADR. Issues such as reasonable accommodation are conducive to the ADR process.[176] Mediation allows the parties to present their issues and identify their resolution objectives in a nonlegal environment, affording the opportunity to develop a creative, voluntary solution.[177] In addition, mediation is less expensive than litigation or other types of settlements.[178] However, because charging parties and respondents often are not familiar with ADR, it is one of the most underutilized processes related to the ADA.

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[165] Ibid.

[166] Ibid.

[167] Thornton interview. *See also* Choate interview.

[168] Wallace interview.

[169] Choate interview.

[170] EEOC, "National Enforcement Plan," p. 9.

[171] "Excerpts from Analytical Perspectives on Federal Budget for Fiscal 1999," released Feb. 2, 1998, as published in Bureau of National Affairs, *Daily Labor Report*, Feb. 3, 1998, p. E–5.

[172] Ibid.

[173] Gingrich testimony.

[174] *Hearing Before the Subcomm. On Commerce, Justice, State, the Judiciary and Related Agencies of the House Comm. On Appropriations*, 105th Cong. 2 (Apr. 1, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

[175] Ibid.

[176] Gary Phelan, Garrison, Phelan, Levin-Epstein & Penzel, P.C., "Plaintiff's Analysis of ADA Cases," presentation at The National Employment Law Institute, *Americans with*

Litigation

If conciliation or any other resolution is not achieved with a charge, remedy can be sought through litigation. EEOC also can participate in a civil action in an *amicus curiae* capacity. As of September 1997, EEOC reported 98 active ADA or ADA-related cases,[179] 142 resolved cases,[180] 6 appeals, and participation as *amicus curiae* in 57 cases on issues relative to the ADA, the Rehabilitation Act of 1973, or State civil rights laws on to disability.[181]

In the past, EEOC has been criticized for failing to litigate more cases. For example, a 1993 GAO study reported that of the total charges received each year, EEOC litigates less than 1 percent. In GAO's report, EEOC stated that it had no plans to increase either staff in the Office of General Counsel or litigation efforts.[182] The Charge Processing Task Force recommended that EEOC not be required to litigate every case where reasonable cause had been found because of limited resources. It recommended discretion to choose those cases that support the National and Local Enforcement Plans.[183] The task force recommended that the field offices be given discretion to distinguish between "reasonable cause" cases and cases that are "litigation worthy" and decide whether to litigate a case. The task force further recommended that the Commission only review litigation decisions for certain types of cases. Cases recommended for such reviews included ADA cases, cases involving major expenditure of resources, and cases identified as raising novel legal issues or having the potential for adverse publicity. All other decisions to file litigation should be delegated to the General Counsel or the designee(s).[184]

In addition, EEOC and the Department of Justice (DOJ) do not coordinate their ADA litigation activities very well. This is particularly true with regard to employment issues under title II (State and local employers). DOJ only litigates a small portion of its State and local employment cases. Part of the problem is that there is not much employment expertise at DOJ.

Under the National Enforcement Plan, the General Counsel is delegated the authority to make the decision to commence or intervene in all litigation except cases involving a major expenditure of resources; cases where the EEOC has not adopted a position through regulation, policy guidance, decision, or compliance manuals; cases where the likelihood of controversy may warrant Commissioners' consideration; and all recommendations in favor of agency participation as *amicus curiae*.[185] Under title VII and the ADA, EEOC must seek the court's permission to intervene in a case by certifying that the case is of general public importance.[186]

In the NEP, the Commissioners delegated to the General Counsel the authority to refer public sector title VII and ADA cases that fail conciliation to the Department of Justice, as well as to redelegate this authority to regional attor

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Disabilities Act Briefing, Washington, DC, Apr. 30, 1998, p. 2 (hereafter cited as Phelan presentation).

[177] Ibid., pp. 5–6.

[178] Ibid.; and David K. Fram, Director, ADA and EEOC Services, National Employment Law Institute, "Update on Who is an 'Individual with a Disability' Under the ADA," presentation at The National Employment Law Institute, *Americans with Disabilities Act Briefing*, Washington, DC, Apr. 30, 1998 (hereafter cited as Fram presentation).

[179] EEOC, "Docket of Americans with Disabilities Act (ADA) Litigation, As of September 30, 1997," p. 7 n.1 (hereafter cited as EEOC, "ADA Docket").

[180] Ibid., p. 30 n.2.

[181] Ibid., p. 73 n.3. Appellate cases are currently under appeal or have been decided on appeal. The docket lists 22 issues, including accessibility, disability benefits, harassment, health insurance coverage, promotion, reasonable accommodation and record keeping. Ibid., Table of Contents.

[182] GAO, *EEOC: An Overview*, p. 12.

[183] EEOC, "Charge Processing Task Force Report," p. 21.

[184] Ibid., pp. 21–2.

[185] EEOC, "National Enforcement Plan," p. 8.

[186] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 19. *See* 42 U.S.C. § 2000e–5(f)(1)(1994).

TABLE 6.2
EEOC Involvement in Cases by Issue

Issue	Number of cases Trial docket	 Appellate docket	 *Amicus curiae*
Accessibility	1	1	0
Arbitration	0	0	1
Association	2	0	0
Confidentiality	16	0	0
Demotion	2	0	1
Disability benefits	6	1	3
Disability-related inquiries	41	1	3
Dual filing	0	0	1
Forced leave	9	0	0
Harassment/hostile work environment	8	0	0
Health insurance coverage	17	0	3
Hiring	61	1	3
Limiting, segregating, and/or classifying	10	0	0
Post and/or keep posted EEOC notices	1	0	0
Promotion	4	0	1
Qualified individual with a disability/disability	0	0	28
Reasonable accommodation	81	3	13
Record keeping	6	0	1
Reinstatement	13	0	0
Retaliation	12	0	0
Termination	113	2	18
Terms and conditions	24	0	0
Total*	427	9	76

* Because many cases involve more than one issue, the total number of cases in the table does not equal the total number of cases in which EEOC has been involved.

Source: EEOC Charge Data System.

neys.[187] The NEP also gives the General Counsel the authority to redelegate to regional attorneys the authority to start litigation.[188] However, the General Counsel did not redelegate litigation authority for ADA cases. According to an Assistant General Counsel in Litigation Management Services, regional attorneys recommend ADA cases for litigation to the General Counsel, who approves the case or forwards it to the Commissioners for approval.[189] If the case is approved for litigation, the trial attorney files the case and handles the case like any other.[190] The joint report of the task forces on litigation and priority charge handling procedures recommended that 5 years of experience with the ADA was sufficient for regional attorneys to be able to make litigation decisions on ADA cases.[191]

EEOC has litigated cases, or participated as *amicus curiae*, on a variety of ADA issues. Trial cases are handled primarily by trial attorneys in the field offices, with the exception of cases litigated by the Systemic Litigation Services unit of the Office of General Counsel (OGC). Appeals cases are handled by attorneys in OGC's Appel

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[187] EEOC, "National Enforcement Plan," p. 8.

[188] Ibid.

[189] Jerome Scanlan, Assistant General Counsel, Litigation Management Services, Office of General Counsel, EEOC, interview, Apr. 6, 1998.

[190] Katherine Bissel, Trial Attorney, New York District Office, EEOC, telephone interview, Apr. 16, 1998. *See also* Lee interview.

[191] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 18.

TABLE 6.3
EEOC Involvement in Cases by Impairment

	Number of cases		
Impairment	**Trial docket**	**Appellate docket**	***Amicus curiae***
Arm/shoulder/hand	10	0	1
Asthma	3	0	1
Back impairments	32	0	5
Blood disorders	1	0	1
Cancer	16	0	2
Cardiovascular/heart	8	0	2
Cumulative trauma disorder/ carpal tunnel syndrome	9	0	2
Diabetes	12	0	0
Emotional/psychiatric impairments	11	2	1
Epilepsy/seizures	12	1	6
Hearing impairments	16	0	2
HIV/AIDS	36	0	5
Knee/leg	7	0	0
Mental retardation	1	0	0
Mobility	7	1	1
Neck/head	1	0	0
Obesity	2	0	1
Paralysis	6	0	0
Speech	3	0	0
Spinal	7	0	2
Substance abuse	5	0	1
Visual impairments	6	0	1
Other	36	1	6
Total*	247	5	40

* Because some cases involve more than one impairment, the total number of cases in the table does not equal the total number of cases in which EEOC has been involved.

Source: EEOC, Charge Data System.

late Services unit who also prepare *amicus curiae* briefs. Table 6.2 describes EEOC's involvement in litigation by the issues involved. The issues EEOC has litigated the most are termination (113 cases litigated), reasonable accommodation (81 cases), and hiring (61 cases). Appeals cases have involved the issues of accessibility, disability benefits, hiring, reasonable accommodation, termination, and the definition of disability and whether a person is a qualified individual with a disability.[192] EEOC also has written a number of *amicus* briefs on the definition of disability/qualified individual with a disability (28 briefs), termination (18 briefs) and reasonable accommodation (13 briefs).[193]

EEOC also tracks its litigation by the disability or impairment involved in the case, as shown in table 6.3. EEOC has litigated 36 cases involving HIV/AIDS. EEOC has also been involved in a number of cases involving back impairments (32 cases litigated) and cancer (16 cases litigated). Appellate cases have involved emotional/psychiatric impairments (2 cases), epilepsy/seizures (1 case), and mobility impairments (1 case). EEOC's *amicus curiae* participation has focused on a number of impairments, including emotional/psychiatric impairments (6 briefs), HIV/AIDS (5 briefs), back impairments (5 briefs), and cancer (2 briefs).[194]

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[192] According to EEOC, this issue: "encompasses cases where the issue is whether the individual is substantially limited in a major life activity, i.e., is the person an individual with a disability, and also where the issue is whether the individual can be considered a qualified individual with a disability because, for example, s/he stated in another forum for purposes of obtaining disability benefits that s/he was unable to work because of a disability. The latter issue often overlaps with the issue of judicial estoppel." EEOC, "ADA Docket," p. 119.

[193] Data derived from EEOC, "ADA Docket," pp. 105–41.

According to an Assistant General Counsel in Appellate Services, the decision to appeal a case is made based on the chances of success, in light of how the case has progressed.[195] Similarly, in deciding whether to file an *amicus* brief, EEOC looks at cases at the appeals level that might resolve unsettled issues of law. The Assistant General Counsel stated that *amicus* participation is an important part of policy because often there are questions about the existing regulations or guidance. Such documents cannot always address the many applications of the policy, nor can they anticipate all of the issues that might be related. Further, if EEOC's position has not been accepted in one court and an issue is up for trial in another court, EEOC might get involved in an attempt to influence the outcome.[196]

Data from the Charge Data System show that the district offices vary by the number of ADA cases they have litigated, as shown in table 6.4. The EEOC District Offices in Detroit, Memphis, Philadelphia, and Miami have litigated the most ADA cases with 23, 16, 15, and 13 cases, respectively. The Baltimore, Chicago, and Indianapolis District Offices have each litigated 12 ADA cases, while Phoenix has been involved in 11 ADA cases. The remaining district offices have been involved in 9 or less ADA cases.[197]

TABLE 6.4
ADA Cases Litigated by EEOC District Offices

District office	No. of ADA cases
Atlanta, GA	3
Baltimore, MD	12
Birmingham, AL	6
Charlotte, NC	5
Chicago, IL	12
Cleveland, OH	4
Dallas, TX	7
Denver, CO	1
Detroit, MI	23
Houston, TX	9
Indianapolis, IN	12
Los Angeles, CA	5
Memphis, TN	16
Miami, FL	13
Milwaukee, WI	6
New Orleans, LA	2
New York, NY	8
Philadelphia, PA	15
Phoenix, AZ	11
San Francisco, CA	5
Seattle, WA	8
St. Louis, MO	6

Source: EEOC, Charge Data System.

Top EEOC officials agree that litigation is one way that EEOC can have an impact. Acting Chairman Igasaki has stated that the mission of EEOC is to eliminate discrimination, not just to handle cases. Therefore, litigation and other tools, such as Commissioner charges, are important activities.[198] Similarly, Commissioner Miller stated that as a small, underfunded agency, EEOC must focus its resources on cases that will have a wide impact.[199] According to the General Counsel, it is important for EEOC to get involved in cases where it can advance the public interest. In cases of egregious violations of the law, EEOC involvement in a lawsuit shows that the agency is serious about enforcing the law.[200]

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[194] Data derived from EEOC, "ADA Docket," pp. 142–63.

[195] Vincent Blackwood, Assistant General Counsel and Robert Gregory, Senior Attorney, Appellate Services, Office of General Counsel, EEOC, interview in Washington, DC, Apr. 2, 1998, pp. 1–2 (hereafter cited as Blackwood interview).

[196] Blackwood interview, p. 2.

[197] EEOC, Charge Data System, data from October 1, 1989, to September 30, 1997, prepared March 9–11, 1998, by the Charge Data System Division, Office of Information Resources Management Services (hereafter cited as EEOC, Charge Data System).

[198] Igasaki interview.

[199] Miller interview.

[200] EEOC Commission Meeting, Mar. 19, 1998.

Charges of Discrimination

In addition to ADA charges, charging parties may file charges of discrimination with EEOC under title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the Age Discrimination in Employment Act. Charge intake and investigation are essentially the same for the four laws. EEOC and FEPA staff enter data on charges into the Charge Data System (CDS) after charge intake. (FEPAs are required to enter data into the system within 5 days of accepting a charge.[201]) The CDS is maintained by the Charge Data System Division in EEOC's Office of Information Resources Management Systems. The database maintained by the CDS Division is updated daily by the field offices as staff process charges. The field offices and FEPAs electronically transmit updates to the database. Every quarter the Program, Planning, and Analysis Division of the Office of Research, Information, and Planning reconciles the data and produces reports. Errors found during the data "cleaning" process are reported to the appropriate field office and corrections are requested.[202]

Data from the CDS are used for internal and external reports. Data are also used in workload planning and monitoring of FEPA contracts.[203] The Program, Planning, and Analysis Division uses the data to prepare reports on charge processing, including quarterly and annual reports and responses to information requests from outside researchers.[204]

The Director of the Program, Planning, and Analysis Division stated that CDS is a more powerful system than the previous system, the Complaint Statistical Report System (CSRS). The CSRS was designed for use by field staff and did not meet the needs of all EEOC staff.[205] However, the Director noted that one improvement needed in the system is a better way of tracking bases and issues. Because charges can be filed concurrently under more than one statute, and because several bases and issues can be identified, it is not possible to distinguish benefits, bases, and issues for one statute from those of another statute. In addition, because of multiple bases, statutes, and issues, the total number of charges appears to be greater than the actual number. Staff and other researchers have experimented with different ways of reporting data on bases and issues, but the problem remains unresolved.[206]

The Director of the Program, Planning, and Analysis Division noted that the CDS does a good job of meeting the needs of headquarters staff, given that EEOC never received additional funding to develop it. The system could be improved in several ways, such as in improving the reports generated from the system.[207] Constant updating and programming is needed to keep the reconciled data up to date with the data in the national database; however, EEOC has done this only twice in the past several years. Similarly, programmers are not available to create new reports and expand the information contained in the database. For example, currently there is no report to track charges reclassified from one priority category to another.[208] Additional programming is also needed to add new data categories to the automated report used to reconcile data. EEOC is planning to update the system into an integrated management system, but has not begun the design phase of the project.[209]

Technology limitations may also affect the usefulness of the CDS. Both EEOC and outside commentators have noted that EEOC needs to upgrade its computer systems.[210] For example, the EEOC task force report on FEPAs noted that FEPAs were using computers that could not

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[201] EEOC, FEPA Task Force, "EEOC's State and Local Program and Relationship with Fair Employment Practice Agencies," Mar. 15, 1995, p. XII–1 (hereafter cited as EEOC, "FEPA Task Force Report").

[202] James Goldweber, Director, Program, Planning, and Analysis Division, Office of Research, Information, and Planning, EEOC, interview in Washington, DC, Apr. 1, 1998, p. 2 (hereafter cited as Goldweber interview).

[203] EEOC, "FEPA Task Force Report," p. XII–1.

[204] Goldweber interview, p. 1.

[205] Ibid., p. 2.

[206] Ibid., pp. 2–3.

[207] Ibid., p. 2.

[208] Ibid., p. 3.

[209] Ibid., p. 2.

[210] *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. 5 (Mar. 3, 1998) (statement of David A. Cathcart, Esq., Gibson, Dunn, & Crutcher). *See also* Igasaki interview.

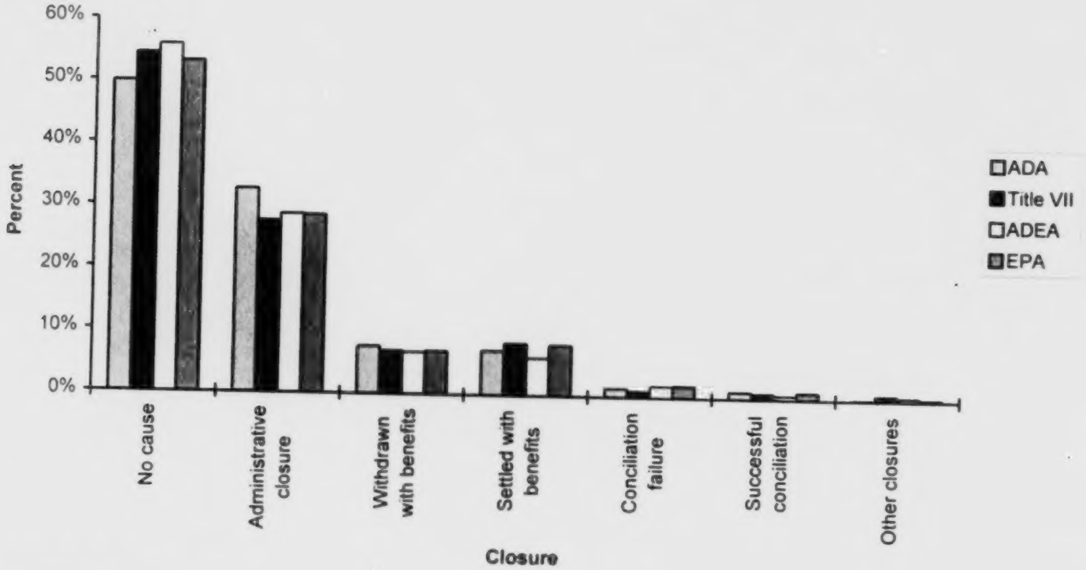
TABLE 6.5
Characteristics of Charging Parties, by Statute

	ADA	Title VII	ADEA	EPA
Total number of charges	172,553	885,823	241,508	11,587
Race				
Asian or Pacific Islander	0.9	1.8	1.2	0.6
Black	16.3	46.9	13.0	14.8
American Indian or Alaskan Native	0.6	0.7	0.4	0.4
White	60.7	18.1	23.9	14.9
Other/Not specified	21.6	32.5	61.5	69.3
National origin				
East Indian	0.2	0.4	0.4	0.2
Hispanic	4.8	7.1	4.7	3.9
Mexican	1.2	2.1	1.2	0.8
Other/not specified	93.8	90.3	93.7	95.1
Sex				
Female	45.5	59.0	40.1	91.2
Male	54.2	40.6	59.4	8.1
Not specified	0.3	0.3	0.4	0.7

Note: Data based on charges received between October 1, 1989, and September 30, 1997. Charges for each statute include those filed only under the statute and those filed jointly under other statutes.

Source: EEOC, Charge Data System.

FIGURE 6.2
Closures by Statute



Source: EEOC Charge Data System.

handle the large volume of charges. Further, FEPAs had data transmission problems due to modem or phone line deficiencies and some staff were not sufficiently trained on the operation of the system. These problems lead to inaccurate and incomplete data.[211]

In regards to technology, Commissioner Miller stated that EEOC staff has no e-mail capability, no access at their desks to the Internet or legal research tools, and no easy access to the CDS.[212] Similarly, at a congressional oversight hearing, Acting Chairman Igasaki stated, "Unfortunately, the Commission has never had the resources to make the necessary investment to modernize its outdated and overburdened information systems, or build an adequate communications infrastructure."[213] He also noted that a significant portion of the proposed $37 million increase in EEOC's budget will go toward improved technology.[214]

The U.S. Commission on Civil Rights obtained data for this report from the CDS Division. Thus, the data reported below are from the national database, not the reconciled database prepared by the Program, Planning, and Analysis Division. Because these data have not been through the data "cleaning" process, some charges with incomplete or erroneously entered information were not included in the analyses.[215]

Charges Under All Statutes

Charging party characteristics vary by the statute under which the claim is filed. Charging parties may identify up to eight issues on employment policies and practices involved in discrimination charges. Issues involve various employment practices, including benefits, disciplinary measures, and wages. The majority of all EEOC charges involves involuntary termination of employment (discharge). For example, in fiscal year 1996, almost half (47.5 percent) of all EEOC charges received identified discharges. EEOC also receives many charges on the denial or inequitable application of rules, privileges, or benefits.[216] The basis for the charge must also be identified. Charging parties must state the reason, or basis, they believe they were discriminated against. Bases vary by statute and include religion, gender, national origin, race, and disability.

Table 6.5 shows that the demographic characteristics of charging parties varies by statute. Persons filing charges under the ADA are more likely to be white (60.7 percent) than persons filing charges under the other statutes (approximately 18 percent, 24 percent, and 15 percent for title VII, ADEA, and EPA, respectively). However, ADA charges are more evenly spread between males (54.2 percent) and females (45.5 percent), unlike the other statutes. There are relatively few differences among charging parties by national origin and statute.[217]

Charges differ not only in demographic characteristics of the charging party, issues involved, and bases for discrimination, but in the ways they are closed as well. EEOC identifies several closure types:

- settlement
- withdrawal with benefits
- conciliation
- unsuccessful conciliation
- no cause finding
- administrative closures
- remands[218]

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[211] EEOC, "FEPA Task Force Report," pp. XII-1—XII-8.

[212] Miller interview, p. 6.

[213] *Hearing Before the Subcomm. on Commerce, Justice, State, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 105th Cong. 4 (Apr. 1, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

[214] Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce, 105th Cong. 8 (Apr. 1, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

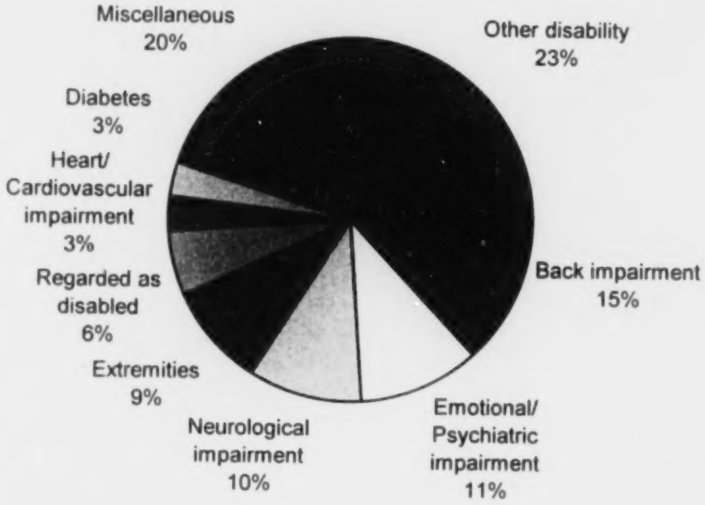
[215] All data presented in this report are based on charges received by EEOC and FEPAs between October 1, 1989, and September 30, 1997. ADA charges were identified by selecting all charges which indicated ADA as the statute involved and are not date-constrained. Charges for each statute include both those filed only under the statute and those filed jointly under other statutes.

[216] EEOC, National Database Automatic Reporting Facility, "EEOC Receipts, FY—1993," Oct. 26,. 1997. *See also*, EEOC, *Charge Data System (CDS) Codes*, March 1997 (hereafter cited as EEOC, *CDS Codebook*), pp. 70–75.

[217] EEOC, Charge Data System.

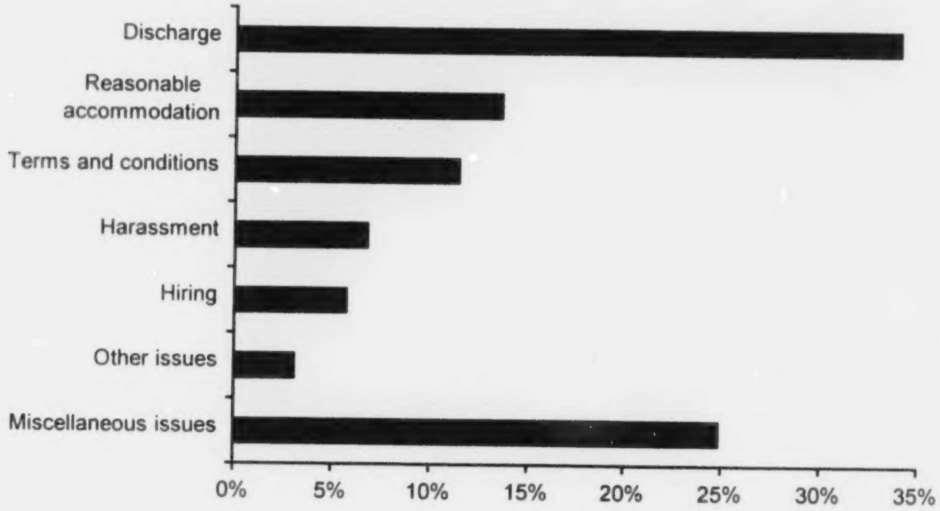
[218] Remands are a small proportion of all closures. Thus, they are included with "Other Closures" in figure 6.2. Other Closures also includes cases closed by a FEPA determination, hearings discrimination finding, cases settled by the legal unit, open charges settled by the legal unit, and hearing class accepted. EEOC, *CDS Codebook*, pp. 16–40.

FIGURE 6.3
ADA Charges by Basis



Source: EEOC, Charge Data System.

FIGURE 6.4
ADA Charges by Issue



Source: EEOC, Charge Data System.

The four statutes EEOC enforces differ little by type of closure. As shown in figure 6.2, most closures result from no cause findings. Over 50 percent of charges under the EPA, ADEA, and title VII, and just under 50 percent of all ADA cases, result in no cause findings. Close to 30 percent of all closures are administrative closures, which includes notice of right to sue requested by the charging party, no jurisdiction, withdrawal without benefits, and charging party's failure to cooperate.[219] Approximately 15 percent of all charges are closed due to the charging party withdrawing the charge after receiving benefits or settling with benefits. Successful conciliations and conciliation failures are each only about 1 percent of all closures.[220] It is not clear under which closure category ADR closures would fall.

A no cause finding is issued when a full investigation fails to support the allegations.[221] However, the large number of no cause findings suggests that either many charging parties file nonmeritorious claims that waste EEOC staff time and resources, or EEOC needs to reevaluate its charge processing procedures to ensure that charges are being properly evaluated and investigated.

Charges Under the ADA

Bases

As shown in figure 6.3, ADA charges can identify a number of disabilities as the basis for the alleged discrimination. For example, between fiscal year 1992 and fiscal year 1997, one-fifth of the charges citing the ADA involved "miscellaneous" disabilities, such as mental retardation, allergies, speech impairments, etc., which, when considered individually, are each less than 3 percent of all ADA charges.[222] "Other" disabilities, disabilities not specifically identified in the EEOC charge data system, account for 23 percent of all ADA charges.

Back impairments, emotional/psychiatric disabilities, and neurological impairments account for 15 percent, 11 percent, and 10 percent of all ADA charges, respectively. Disabilities involving the extremities (such as missing digits/limbs, arthritis, and other inability to move or use certain body parts) account for 9 percent of all ADA charges.[223] ADA charges by all disabilities are presented in appendix A. Being regarded as disabled is the basis for 6 percent of all ADA charges. Having a record of a disability and having a relationship or association with an individual with a disability, respectively, account for almost 2 percent and less than 1 percent of all ADA charges. Other higher profile[224] impairments, such as drug addiction, alcoholism, and HIV/AIDS, each accounts for less than 2 percent of all ADA charges.[225]

The category "other" has changed over the years. According to the Director of the Program, Planning, and Analysis Division, when EEOC was given jurisdiction over the ADA, a committee did outreach and worked with outside groups to develop the bases to be used in writing charges. When the ADA first went into effect, the Program, Planning, and Analysis Division monitored the reporting trends closely. The categories changed as EEOC learned about what types of complaints were being filed. For instance, at first many ADA charges identified "other disability" as the basis. Thus, the list of disabilities was expanded to include more specific disabilities. Similarly, repetitive motion injury was added later after staff noted a rise in charges based on repetitive motion disorders.[226]

Issues

Charging parties may identify up to eight issues in their charge of discrimination. As

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[219] EEOC, National Database Automatic Reporting Facility, "EEOC Closures, FY—1996," Oct. 26, 1997. *See also*, EEOC, *CDS Codebook*, pp. 42–54.

[220] EEOC, Charge Data System.

[221] EEOC, *CDS Codebook*, p. 31.

[222] EEOC, Charge Data System. Impairments identified in the Charge Data System, but represented as Miscellaneous in figure 6.3 are: hearing impairment, vision impairment, cancer, alcoholism, record of disability, asthma, HIV, drug addiction, gastrointestinal impairment, other blood disorder, respiratory/pulmonary disorder, speech impairment, allergies, relationship/association with an individual with a disability, kidney impairment, mental retardation, chemical sensitivities, disfigurement, and dwarfism. *See* app. A.

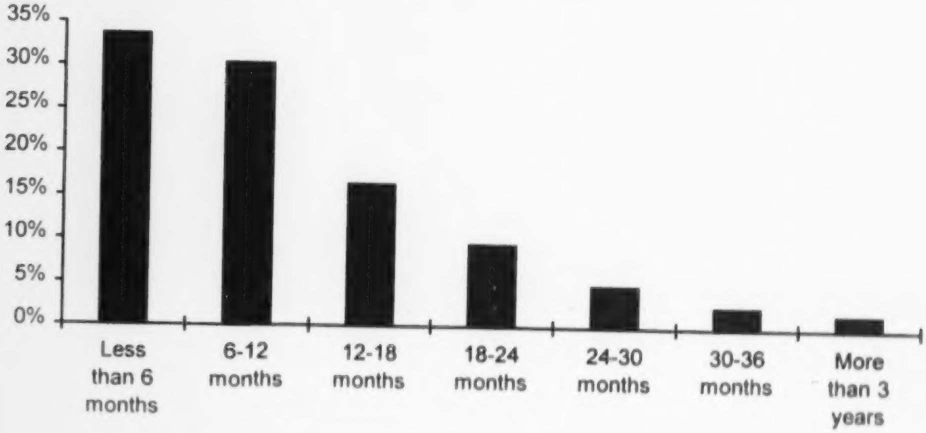
[223] EEOC, Charge Data System.

[224] See chaps. 4 and 5 for discussion of disagreements within the courts concerning the applicability of the ADA to certain disabilities and impairments.

[225] EEOC, Charge Data System. *See* app. A.

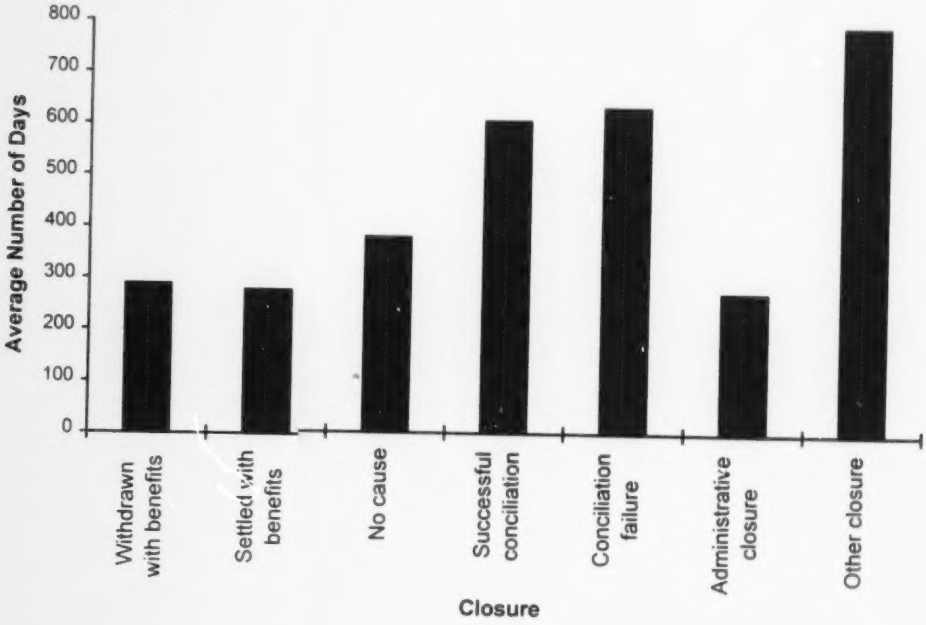
[226] Goldweber interview, p. 2.

FIGURE 6.5
Processing Time: ADA Charges



Source: EEOC, Charge Data System.

FIGURE 6.6
Average Number of Days to Close ADA Charges



Source: EEOC, Charge Data System.

TABLE 6.6
Months to Close Charge, by Processing Time

Months to close charge	Percentage of charges					
	Category A charges		Category B charges		Category C charges	
	All charges	ADA charges	All charges	ADA charges	All charges	ADA charges
0-6	22.8	22.7	31.3	30.1	44.2	45.4
6-12	26.2	26.4	27.7	27.8	20.8	21.1
12-18	16.7	16.4	16.8	17.0	16.1	15.6
18-24	11.9	12.5	11.5	12.4	10.1	9.7
24-30	8.7	9.4	6.9	6.8	5.6	5.4
30-36	7.9	6.4	2.4	3.6	1.2	1.9
36 or more	5.8	6.1	3.5	2.3	2.0	0.8

Source: EEOC, Charge Data System.

shown in figure 6.4, over one-third of ADA charges involve the issue of discharge, or involuntary termination of employment. Another 14 percent involve the failure of an employer to provide reasonable accommodation. Terms and conditions are identified in almost 12 percent of ADA charges. This issue relates to the "denial or inequitable application of rules relating to general working conditions or the job environment and employment privileges which cannot be reduced to monetary value."[227] Harassment, hiring, and other issues not defined by EEOC account for approximately 7 percent, 6 percent, and 3 percent, respectively, of ADA charges.[228]

Several issues, separately, each accounts for less than 3 percent of all ADA issues. However, jointly they are almost 25 percent of the issues identified in ADA charges. These include promotion (2.34 percent of ADA issues), benefits (1.23 percent), and prohibited medication inquiries or exams (0.28 percent). All issues appear in appendix B.[229]

Processing Time

By the close of fiscal year 1997, EEOC had closed 142,743 charges, approximately 83 percent of the total number of ADA charges it has received.[230] Another 19,890 charges (11.5 percent) remained open at the end of the fiscal year.[231] Almost two-thirds of all ADA charges that have been closed were processed within 12 months, as shown in figure 6.5. Slightly more than 9 percent of all ADA charges took more than 2 years to be closed, with 1.8 percent requiring 3 years or more to be closed.

However, as shown in figure 6.6, the number of days to close an ADA charge depends on the type of closure.[232] On average, it takes 281 days to close a charge in cases where the charging party settles with benefits. In contrast, it takes an average of 608 days to conciliate a case, for those cases with successful conciliations. Unsuccessful conciliations have required slightly more time—635 days.

As seen in table 6.6 and figure 6.7, among cases that have been prioritized as A, B, or C under the Priority Charge Handling Procedures, processing time for ADA charges is similar to that of all charges filed with EEOC.

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[227] EEOC, *CDS Codebook*, p. 76.

[228] EEOC, Charge Data System.

[229] Ibid.

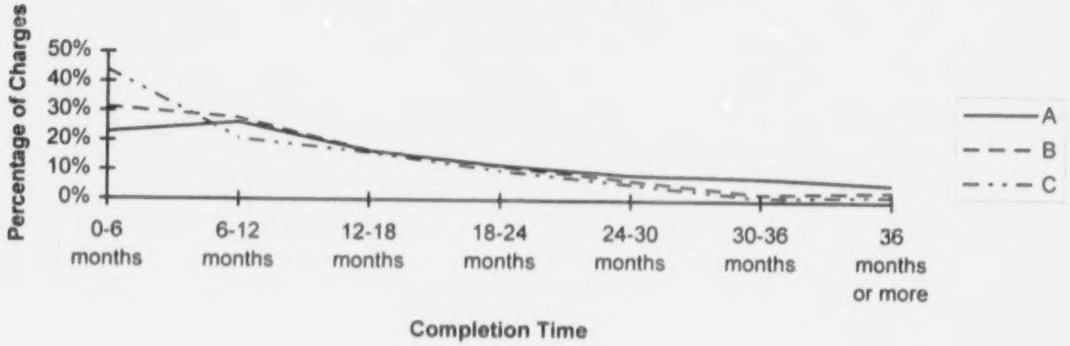
[230] 83,664 of these charges were handled by EEOC, the rest were handled by FEPAs. *See* EEOC Comments, July 17, 1998, p. 3.

[231] An additional 9,920 charges included in the database provided to the Commission for this report had missing or incorrect data. Thus, the length of time charges were open or the length of time to close such charges could not be determined.

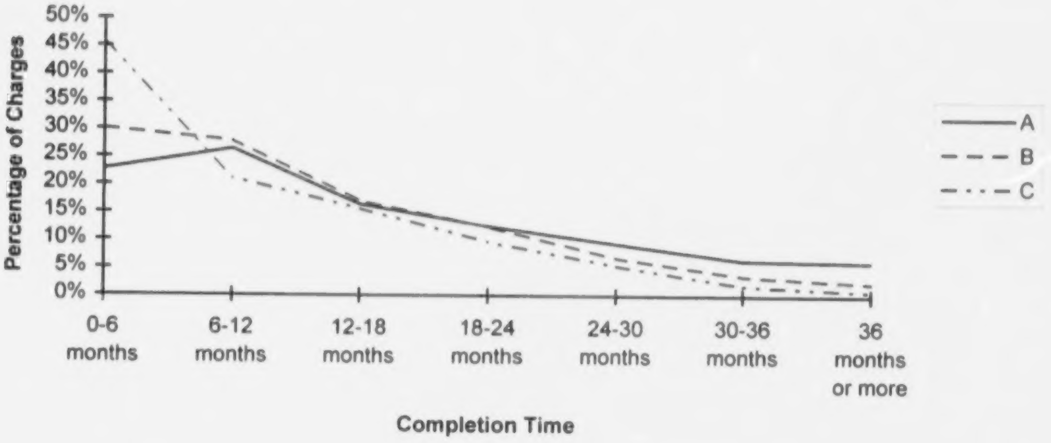
[232] This is shown in more detail in app. C.

FIGURE 6.7
Processing Time by Priority

6.7a. All EEOC Charges

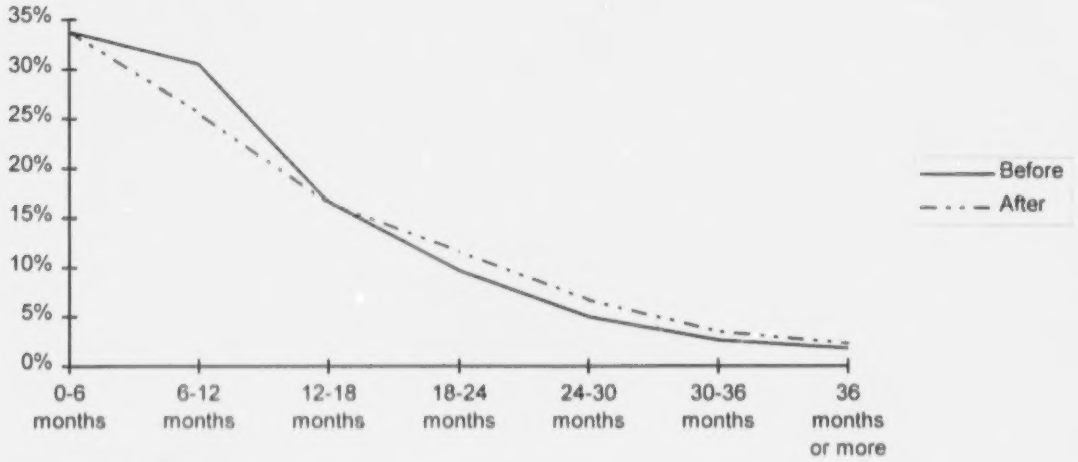


6.7b. ADA Charges



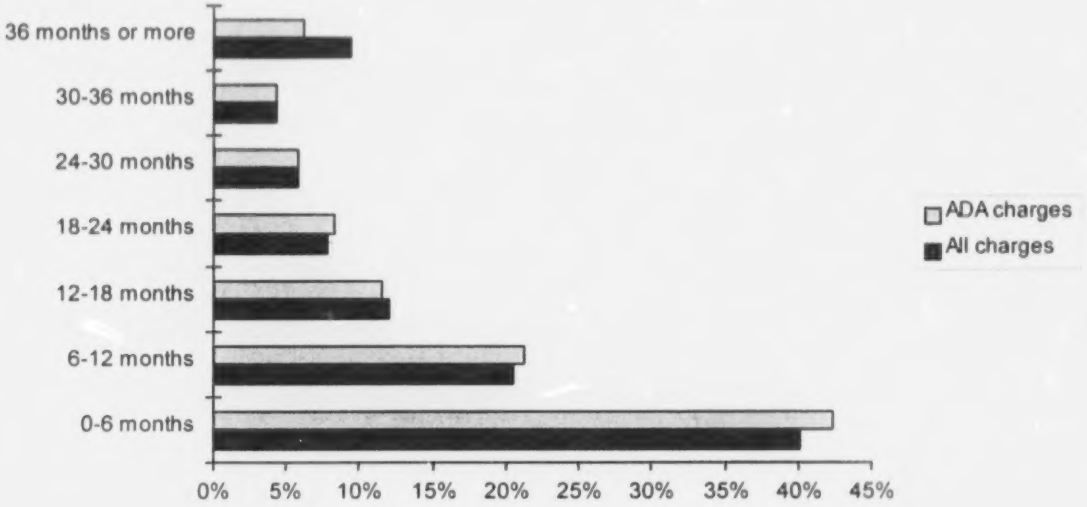
Source: EEOC, Charge Data System.

FIGURE 6.8
Charge Processing Time Before and After Priority Charge Handling Procedures



Source: EEOC, Charge Data System.

FIGURE 6.9
Status of Open Charges



Source: EEOC, Charge Data System.

Processing time has changed little since the introduction of the Priority Charge Handling Procedures. As shown in figure 6.8, before charges were prioritized, 33.8 percent of all charges were closed within 6 months, and another 30.5 percent were closed between 6 and 12 months of receipt of the charge. Similarly, among the charges that have been categorized since 1995, 33.9 percent have been closed after 6 months, while 25.6 percent have been closed between 6 and 12 months of receipt. Overall, the percentage of cases that takes more than 2 years to close has risen slightly, from 9.4 percent before the implementation of the Priority Charge Handling Procedures to 12.5 percent under the new procedures.

In figure 6.9, ADA charges are compared to all charges filed under title VII, ADEA, and EPA. Open ADA charges differ only slightly from all EEOC charges, and differences may reflect the relative ages of the various civil rights laws. For example, 17 percent of open ADA charges have been open for 2 years or more, compared to 20 percent of all open charges received by EEOC.

Benefits

Of all ADA charges, approximately 16 percent receive benefits of some form. Of those receiving benefits, almost half (48.1 percent) receive direct monetary benefits, such as restored pay, fringe benefits, compensatory damages, or punitive damages.[233] Another 14.4 percent of ADA charges receive indirect monetary benefits such as promotion, reinstatement/recall, or new hire. The remaining 37.5 percent of charging parties who receive benefits in relation to their ADA charges receive nonmonetary benefits.[234] These benefits include policy change, training/apprenticeship, seniority, job referral, union membership, EEO notices, and reasonable accommodation.[235]

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[233] Those receiving monetary benefits account for 7.5 percent of all ADA charges. EEOC, Charge Data System.

[234] 5.8 percent of all ADA charges receive nonmonetary benefits. EEOC, Charge Data System.

[235] EEOC, *CDS Codebook*, p. 55.

7 Assessment of EEOC's Outreach, Education, and Technical Assistance

The U.S. Equal Employment Opportunity Commission does outreach and provides technical assistance to the public on rights and obligations under the laws that the agency enforces through presentations to professional organizations, business owners, advocacy groups, and Federal and private employers and employees. Presentations have included workshops, conferences, and announcements on radio and television, as well as technical assistance and training documents disseminated to the public.

EEOC staff provided outreach and education on the ADA before and during its first full year of ADA enforcement.[1] The Office of Legal Counsel established an ADA speakers bureau to provide speakers from headquarters and field offices for public presentations on the ADA.[2] During 1991–92, the Commission established a toll-free ADA "helpline" and developed several informational booklets for employers and persons with disabilities, explaining ADA requirements in "simple, practical language and responding to frequently asked questions."[3]

Because of its limited resources for outreach and related activities, EEOC requested legislation that would create funds for outreach and technical assistance programs.[4] The EEOC Education, Technical Assistance, and Training Revolving Fund Act of 1992[5] created a revolving fund to pay for the cost of providing education, technical assistance, and training relating to the laws administered by the Commission.[6] The revolving fund is supported by fees charged to recipients for technical assistance and training services.[7] Although many medium-size employers participate in the technical assistance seminars, a significant proportion of the recipients of technical assistance under the revolving fund are major or large employers.[8]

EEOC is required, as part of its enforcement responsibilities, to provide technical assistance to employers and interested individuals and organizations on their rights and obligations under the

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[1] U.S. Equal Employment Opportunity Commission (EEOC), *Fiscal Years 1991 and 1992: Combined Annual Report*, p. 13 (hereafter cited as EEOC, *FYs 1991 and 1992 Annual Report*); EEOC, *Annual Report 1993*, p. 13 (hereafter cited as EEOC, *FY 1993 Annual Report*).

[2] EEOC, *FYs 1991 and 1992 Annual Report*, p. 13. From October 1991 through October 1992, the Office of Legal Counsel staff made 263 of 300 public presentations on the ADA to a wide range of organizations, including employer groups, disability advocacy organizations, and legal associations.

[3] Ibid., pp. 13–14.

[4] *See* Budget of the United States Government, Fiscal Year 1992, Equal Employment Opportunity Commission (hereafter cited as EEOC Fiscal Year 1992 Budget), p. Part Four–1095.

[5] Pub. L. No. 102–411, 106 Stat. 2102 (codified at 42 U.S.C. § 2000e–4(k) (1994)).

[6] *Id. See also* Budget of the United States Government, Fiscal Year 1995, Equal Employment Opportunity Commission (hereafter cited as EEOC Fiscal Year 1995 Budget).

[7] Pub. L. No. 102–411, 106 Stat. 2102 (codified at 42 U.S.C. § 2000e–4(k) (1994)).

[8] Budget of the United States Government, Fiscal Year 1992, Equal Employment Opportunity Commission (hereafter cited as EEOC Fiscal Year 1992 Budget).

ADA.[9] The Attorney General is required to develop a plan, in consultation with the EEOC and other agencies with ADA enforcement responsibilities, to assist covered entities in understanding and carrying out their responsibilities under the act. EEOC and the Attorney General implement the plan for title I.[10] The ADA also required EEOC to develop and publish a technical assistance manual to help employers comply with title I of the ADA within 6 months after publication of the final implementing regulations.[11]

EEOC prepared an ADA technical assistance manual and three question and answer brochures, all of which were widely distributed.[12] The technical assistance manual has been widely praised by the disability community. For instance, one disability professional wrote, "The technical assistance manuals are very helpful. . . ."[13] Another wrote, "The TA manuals from both entities [EEOC and DOJ] are excellent. The EEOC's is the best because it uses many examples to illustrate almost every point it makes. They are written in plain, simple, easy to understand language, which is quite an accomplishment, considering the complexity of some of the topics involved."[14] In addition, the Office of Legal Counsel staff made 100 public presentations to a variety of organizations representing employers, management and human resources professionals, public safety occupations, legal professionals, and disability and medical groups.[15] The Office of Legal Counsel also delivered training on ADA policy guidance and other ADA issues, and its ADA staff provided legal and policy interpretations to approximately 200 callers weekly throughout the fiscal year.[16] Informal assistance and guidance on the ADA were also provided in response to several hundred written inquiries about the act.

During fiscal year 1993, the Office of Legal Counsel provided technical assistance for the public on requirements of EEOC-enforced laws, with the major emphasis on ADA requirements. The Office of Legal Counsel also provided assistance to other Federal agencies on the ADA through seminars sponsored under the revolving fund.[17] In 1995, the revolving fund helped finance 49 technical assistance program seminars (TAPS), which were attended by more than 5,700 managers, human resource specialists, legal and other officials, and employers nationwide. The seminars provided information on rights and obligations under laws enforced by the Commission.[18]

Each field office now delivers at least two TAPS programs every year. In 1997, EEOC offices held 66 TAPS programs, which were attended by 8,629 participants.[19] Field offices are also aware of the need to reach small businesses and have developed different ways to do so, including offering half-day TAPS programs.[20] Further, there is a recognized need to develop outreach programs targeted toward underserved populations. In fact, the joint report of the priority charge handling and litigation task forces recommended that outreach efforts should focus on reaching underserved populations and "filling gaps in LEP implementation and case development."[21]

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[9] *See* 42 U.S.C. § 12206 (c)(2) (1994). *See also* EEOC, "Policy Guidance: Provisions of the Americans with Disabilities Act of 1990: Summary of the Act and Responsibilities of the EEOC in Enforcing the Act's Prohibitions Against Discrimination in Employment on the Basis of Disability," (EEOC Notice 915–055), Aug. 14, 1990, p. 11 (hereafter cited as EEOC, "Policy Guidance: Provisions of the ADA"); EEOC, *FYs 1991 and 1992 Annual Reports*, p. 13.

[10] EEOC, "Policy Guidance: Provisions of the ADA," p. 11.

[11] Ibid.

[12] *See* EEOC FY 1993 Annual Report, p. 13; *See also* Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), U.S. Commission on Civil Rights (USCCR), July 9, 1998, Comments of the U.S. Equal Employment Opportunity Commission, p. 19 (hereafter cited as EEOC Comments).

[13] Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998, attachment, p. 4 (hereafter cited as Ringer letter).

[14] Michelle Martin, Staff Services Analyst, Department of Rehabilitation, State of California Department of Rehabilitation, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, attachment, pp. 14–15 (hereafter cited as Martin letter).

[15] EEOC, *FY 1993 Annual Report*, p. 13.

[16] Ibid.

[17] Ibid.

[18] EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 15 (hereafter cited as EEOC, Office of Program Operations, *FY 1995 Annual Report*).

[19] EEOC, *March 1998 Task Force Report*, p. 38.

[20] Elizabeth Thornton, Director, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 1, 1998 (hereafter cited as Thornton interview).

Besides revolving fund programs for which a fee is charged, each district office has undertaken various outreach and stakeholder activities that are free to the participants. These activities involve community groups, various organizations and the public as targeted by each district office's Local Enforcement Plan. As outreach funds have become available, these programs were significantly expanded in 1997 and 1998.[22]

As of October 1997, EEOC had prepared eight technical assistance documents to be used by employers, persons with disabilities, and the general public. The documents cover employment questions, rights of individuals with disabilities, employer responsibilities, disability and service retirement plans, and general information and technical assistance. Most of the technical assistance documents are fact sheets presented in question and answer format. EEOC and the Department of Justice's (DOJ's) Civil Rights Division jointly prepared the technical assistance document, "Americans with Disabilities Act: Questions and Answers."[23] EEOC has stated that technical assistance and outreach and education are a critical part of the agency's mission. According to Commissioner Paul Steven Miller, the purpose of outreach and education is to eliminate discrimination by helping employees know their rights and providing information to employers.[24] EEOC continues to do outreach, technical assistance, and training to inform and assist the public in understanding and applying the ADA. EEOC has broadened its contact with print and electronic media, disability rights organizations, small business trade associations, and the Small Business Administration field offices.[25]

When the Americans with Disabilities Act was signed into law on July 26, 1990,[26] certain responsible Federal agencies were mandated to provide technical assistance as an integral part of the pre- and post-implementation phases. Section 506 required that the DOJ, in consultation with EEOC, the Department of Transportation, the Architectural and Transportation Barriers Compliance Board, and the Federal Communications Commission, develop a technical assistance plan within 180 days of enactment to assist entities covered by the ADA and other Federal agencies in understanding their responsibilities under the new law.[27] For the first time, a Federal civil rights statute required that the Federal agencies charged with implementing the law provide technical assistance to entities with responsibilities and individuals with rights so that each could better understand the law and ensure more effective enforcement and compliance.

As required by the ADA, DOJ published a technical assistance plan in the *Federal Register* on December 5, 1990.[28] This was done in consultation with the responsible agencies, including EEOC.[29] The plan covered the period through fiscal year 1994. Because of the heavy workload that the agencies were experiencing with the implementation process, a final plan never was published.[30]

The ADA recognized the importance of technical assistance and outreach to covered entities and individuals, but the law also provided that no covered entity could use failure to receive technical assistance as a reason for noncompliance with the statute. The ADA specifically stated in section 506:

> An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter be-

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[21] EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*" March 1998, p. 40.

[22] Peggy R. Mastrioanni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, July 17, 1998, Comments of the U.S. Equal Employment Opportunity Commission, p. 4 (hereafter cited as EEOC Comments, July 17, 1998).

[23] EEOC and U.S. Department of Justice, Civil Rights Division, "Americans with Disabilities Act: Questions and Answers," (undated brochure).

[24] Miller interview, p. 5.

[25] EEOC, *Fiscal Year 1994 Annual Report*, p. 29 (hereafter cited as EEOC, *FY 1994 Annual Report*).

[26] Pub. L. No. 101–336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (1994)).

[27] *See* 42 U.S.C. § 12206(a) (1994).

[28] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. 50,237 (1990).

[29] *See* 42 U.S.C. § 12206 (a) (2) (1994).

[30] Ruth Lusher, ADA Technical Assistance Program Manager, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, DC, Feb. 23, 1998 (hereafter cited as Lusher February 1998 interview).

cause of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.[31]

ADA Technical Assistance Plan

EEOC, as one of the four implementing agencies, was given primary responsibility for carrying out major portions of the Federal Government's technical assistance efforts for implementation of the ADA.[32] The statute authorized these four agencies, within their respective spheres of responsibility under the ADA, to provide technical manuals to institutions and individuals that have duties or rights under the ADA.[33] The agencies were further required to publish regulations within 1 year of the signing of the ADA for their respective areas.[34]

EEOC worked closely with DOJ in formulating the governmentwide technical assistance plan. EEOC's portion of the plan included a wide range of activities to provide information and to promote voluntary compliance with the law.[35] Technical assistance was defined in the plan as "the provision of expert advice, and both general and specific information and assistance, to the public and to entities covered by the ADA."[36] The purpose of the plan's technical assistance program was "to inform the public (including individuals with rights protected under the Act) and covered entities about their rights and duties; and to provide information about cost-effective methods and procedures to achieve compliance."[37]

Based on the Federal Government's experience with implementing section 504 of the Rehabilitation Act of 1973, the four implementing agencies believed that once the covered entities were given information on how to comply with the ADA, they would comply voluntarily. That experience had demonstrated that a "publicized, readily available, comprehensive technical assistance program"[38] that was responsive to the problems and needs of the covered entities offered many advantages. These included such benefits as a reduction of misunderstandings about rights and responsibilities, facilitation of voluntary compliance, promotion of the exchange of information, and the development of more effective, and less costly, methods to address compliance issues. The technical assistance program also sought to avoid an unnecessary reliance on enforcement and litigation to achieve compliance by the covered entities.[39]

The proposed technical assistance program included virtually all forms of communication. Agencies were expected to use publications, exhibits, videotapes and audiotapes, public service announcements, and electronic bulletin boards. As an essential component of the technical assistance program, materials were to be developed and disseminated in alternative formats which were accessible to individuals with disabilities. In addition, the agencies were expected to make presentations at conferences, workshops and training programs, and provide advice to individuals on specific topics through such mechanisms as a telephone hotline, information clearinghouse, and onsite experts.[40]

The four agencies also were expected to create a clearinghouse function "to benefit from the experiences of covered entities and individuals with disabilities in complying with the ADA."[41] The agencies were to exchange information "to enhance the development, assessment, and replication of new and improved compliance methods and techniques."[42] The technical assistance plan provided for the extensive use of the skills, knowledge, and experience of various groups concerned with disability rights. Such groups included trade associations, advocacy groups, and other similar organizations that communicate and have credibility with covered entities and individuals with disabilities. The input of these groups was intended to maximize the resources of Federal agencies devoted to technical assistance. The goal was to build the capacity of these organizations to provide technical assistance to their constituencies after the period covered by the technical assistance plan and for as long as was necessary in the future.[43]

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[31] 42 U.S.C. § 12206(e) (1994).

[32] *See* Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,239.

[33] 42 U.S.C. § 12206(c)(3) (1994).

[34] *See id.* §§ 12116, 12134(a), 12143(b), 12149(a), 12164, 12204(a) (1994); 47 U.S.C. § 225(d)(1) (1994).

[35] EEOC, "EEOC's Implementation of Title I of the Americans with Disabilities Act of 1990," January 1993, p. 9 (hereafter cited as EEOC, "EEOC's Implementation of Title I of the ADA").

[36] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,239.

[37] Ibid.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Ibid.

Outreach in the Development of Implementing Regulations

EEOC was responsible for issuing regulations for title I of the ADA.[44] The development of "clear and concise regulations, policies and procedures" was part of EEOC's enforcement strategy for implementing title I of the ADA. EEOC did extensive outreach in soliciting feedback in the development of the regulations beginning with the publication of the advance notice of public rulemaking in the *Federal Register* on August 1, 1990.[45] In response, comments were received from 138 disability rights organizations, employer groups, and individuals.[46] Also, EEOC's field offices throughout the country held 62 ADA input meetings that were attended by more than 2,400 representatives from disability rights organizations and employer groups.[47]

Before issuing a notice of proposed rulemaking, EEOC held briefings for congressional staff, representatives of disability rights groups, employer organizations, and the media. The notice was published, with an interpretive appendix, in February 1991. Comments were received from 697 interested groups and individuals. EEOC revised and clarified the final regulations and interpretive guidance based on the feedback received. Since publication, the agency has distributed tens of thousands of copies of the final regulations, which also have been made available in such alternative formats as Braille and large print, and on audio cassette and computer diskette.[48]

Technical Assistance Manual

EEOC, along with the other implementing agencies, also was required to publish a technical assistance manual no later than 6 months after the publication of the final regulations.[49] EEOC published a comprehensive technical assistance manual in January 1992, which included an explanation of the legal requirements of the ADA and the regulations as they applied to specific employment practices.[50] The manual also included examples of reasonable accommodation and other key aspects of compliance, along with an extensive directory of technical assistance resources.[51] Single copies were made available without cost. Additional copies were available from the Government Printing Office for $25. As of January 1993, EEOC had distributed more than 180,000 copies of the manual.[52] In May 1994, at a briefing on the Americans with Disabilities Act at the U.S. Commission on Civil Rights, Peggy Mastroianni, then Director of the ADA Policy Division at EEOC, said that the ADA technical assistance manual was the most important part of the agency's educational effort on the ADA. She stated that the manual was not written by a lawyer, and information was presented very clearly. The response the manual received was favorable.[53]

Interagency Coordination

The 1990 ADA technical assistance plan stated that the Federal agencies involved in the implementation efforts recognized the importance of coordinating their efforts to avoid overlap or duplication of efforts. Further, the agencies recognized the need to share information and evaluate the effectiveness of their respective technical assistance activities.[54] EEOC worked closely with DOJ on several outreach and education efforts. With funding provided by the National Institute on Disability Rehabilitation Research (NIDRR), the two Federal entities published two editions of the "The Americans with Disabilities Act Questions and Answers." This booklet was designed to answer the most commonly asked questions about the ADA.[55] It was made available in Spanish and alternative formats (Braille, audiotape, large print, and computer diskette).

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[43] Ibid.

[44] 42 U.S.C. § 12116 (1994).

[45] Advance Notice of Proposed Rulemaking, 55 Fed. Reg. 31,192 (1990).

[46] Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (1991).

[47] EEOC, "Implementation of Title I," p. 2.

[48] Ibid., p. 3.

[49] 42 U.S.C. § 12206(c)(3) (1994).

[50] EEOC, A *Technical Assistance Manual on Employment Provisions (Title I) of the Americans with Disabilities Act*, (EEOC-MA-1A), January 1992 (hereafter cited as EEOC, *ADA Technical Assistance Manual*).

[51] EEOC, "Implementation of Title I," p. 9.

[52] Ibid., pp. 9–10.

[53] USCCR, Briefing on the Americans with Disabilities Act, May 6, 1994, p. 7.

[54] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,239.

In conjunction with DOJ, EEOC held a training program in fiscal year 1992 to develop a national network of individuals who would provide training and facilitate other ADA implementation in their local communities promoting voluntary compliance.[56] In Phase I, a 1-week training course on disability rights under the ADA was conducted in Houston, Denver, San Francisco, St. Louis, and Washington, D.C., for 400 disabled persons. After the training was completed, each of the trainees was required to provide ADA training and technical assistance to persons with disabilities, employers, and other covered groups.[57] In phase II, a select group of 100 of the 400 initial trainees was chosen to receive advanced training in title I and alternative dispute resolution. When the advanced training was completed at the end of 1992, the trainees were available to assist EEOC offices and employers in providing technical assistance and in resolving ADA disputes.[58]

In conjunction with its ADA implementation responsibilities, EEOC coordinated regulatory development with other Federal agencies. The agency developed and issued coordinated regulations with the Department of Labor in January 1992, "to avoid duplication of effort and inconsistent standards in processing complaints falling within the overlapping jurisdiction of title I of the ADA and Section 503 of the Rehabilitation Act of 1973."[59] DOJ and EEOC developed a similar joint regulation addressing complaints falling within the jurisdiction of the ADA and section 504 of the Rehabilitation Act. The joint regulation was published in the *Federal Register* in April 1992 for public comment.[60] The final regulation was published in August 1994,[61] "following extensive coordination with DOJ and 25 Federal agencies with Section 504 enforcement responsibilities."[62] EEOC also reviewed existing Federal agency regulations to identify provisions that might conflict with the ADA. For example, several agencies had issued regulations that established physical qualification standards for certain categories of employment that appeared to conflict with ADA requirements.[63]

One national disability organization official has expressed concern that there was inadequate coordination between EEOC and DOJ on the ADA technical assistance program.[64] However, both agencies have worked together on two interagency ADA technical assistance committees. EEOC established an ADA title I technical assistance coordinating group, chaired by EEOC. The other member agencies were: DOJ, the President's Committee on Employment of People with Disabilities, National Institute on Disability and Rehabilitation Research, and the Rehabilitation Services Administration.[65] EEOC also participates in the interagency ADA Technical Assistance Coordinating Committee (originally the ADA Technical Assistance Working Group).[66] The 22-member committee, chaired by DOJ, meets every 3 to 4 months to exchange information on technical assistance and to coordinate outreach efforts and deal with technical assistance issues that arise.[67]

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[55] EEOC, "Implementation of Title I," p. 9.

[56] EEOC, *FYs 1991 and 1992 Annual Report*, p. 13.

[57] EEOC, "Implementation of Title I," p. 11.

[58] Ibid.

[59] EEOC, *FYs 1991 and 1992 Annual Report*, p. 12.

[60] Coordination Procedures for Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973, 57 Fed. Reg. 14,630 (1992) (proposed Apr. 21, 1992).

[61] *See* 29 C.F.R. pt. 1640 (1997).

[62] EEOC, *FY 1994 Annual Report*,, p. 25.

[63] EEOC, "Implementation of Title I," p. 4.

[64] Andrew Imparato, General Counsel and Director of Policy, National Council on Disability, telephone interview, Nov. 25, 1997.

[65] EEOC, *FYs 1991 and 1992 Annual Report*, p. 24.

[66] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,239.

[67] Roster of ADA Technical Assistance Coordinating Committee, dated Feb. 3, 1998.

Technical Assistance Plan

The technical assistance plan proposed for EEOC to reach out to a wide range of organizations and associations representing employers, other covered entities, and individuals with disabilities at the national and local levels. The purpose was to explore ways in which their established information channels could be used to provide general and specific information on the employment provisions of the ADA. The organizations were to be asked to identify specific technical assistance needs of their respective constituencies so that EEOC could direct its efforts better to meet those needs.[68]

Before passage of the ADA, in March 1990, EEOC initiated a survey of the fair employment practice agencies to learn what their experiences had been in enforcing State employment discrimination laws similar to the ADA and to assist in developing information on the estimated impact on EEOC's enforcement program. Later in 1990, EEOC staff held informal consultations with national organizations representing employers and individuals with disabilities to solicit suggestions for the technical assistance program and the technical assistance manual.[69] The agency staff also held informal meetings in all 23 district offices and in Washington, D.C., seeking feedback on ADA title I regulations from the employer and disability communities. More than 2,400 representatives from disability rights organizations and employer groups participated in these meetings.[70] In early 1991, the staff held briefings for congressional staff and representatives from disability rights organizations, employer groups, and the media to announce the publication of the agency's title I notice of proposed rulemaking.[71] In May 1991, EEOC sponsored focus groups to learn what employers wanted to know about the ADA and in what format they would like to receive the information.[72]

The technical assistance plan also stated that employers and other covered organizations would be actively encouraged to seek information and assistance to maximize their voluntary compliance. Assurances were given that EEOC's program would be separate and distinct from its enforcement responsibilities.[73] The plan stated that employers and others who participate in training conducted by the agency or who request information or assistance in regard to a particular aspect of compliance would not be subject to investigation or other enforcement activity on the basis of such participation or inquiries.[74]

ADA Technical Assistance Program

Phase I

The proposed 1990 technical assistance plan was linked to the implementation of the ADA and issuance of the title I regulations by EEOC. The first phase of the outreach and assistance program, covering the period ending July 26, 1992 (when the act first took effect), was intended to inform covered entities and individuals with disabilities about their obligations and rights. During this phase, general information would be provided on rights and responsibilities in employment under the ADA and specific information on the application of ADA nondiscrimination requirements to a range of employment practices. In addition, guidance would be provided to employers on complying with the law's reasonable accommodation provisions.[75]

To ensure that the proposed activities would be carried out within the tight mandatory target dates established in the statute, EEOC created a new Americans with Disabilities Act Services Unit (ADAS) in the Office of Legal Counsel. More than 2 years after the ADA was enacted, EEOC dissolved ADAS and integrated its functions into those offices already responsible for providing policy guidance and technical assistance under all of the statutes that the agency enforces.[76] The technical assistance functions were dispersed to the Office of Communications and Legislative Affairs, the Office of Legal

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[68] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,240.

[69] EEOC, *FYs 1991 and 1992 Annual Report*, p. 23.

[70] Ibid.

[71] Ibid., p. 24.

[72] Ibid.

[73] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,240.

[74] Ibid.

[75] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,241.

[76] EEOC, "EEOC's Implementation of Title I of the ADA," p. 2.

Counsel, and the Office of Field Programs (formerly Office of Program Operations).

The initial focus of EEOC's implementation efforts was "the development of clear and concise regulations, policies and procedures."[77] When the ADA was passed, only a small portion of the agency's staff had experience with disability law,[78] so EEOC also focused on training staff.[79] In fiscal year 1990, the Office of Legal counsel provided initial training on the ADA to EEOC district offices and headquarters managers and supervisors.[80] Subsequently, an intensive 1-day training program, "ADA Into the Twentieth Century," was developed and delivered to 2,600 staff members in all of the agency's field offices between November 1991 through February 1992.[81] Both training programs were videotaped and made available to all EEOC offices.[82] In fiscal year 1992, approximately 80 percent of the agency's training activities focused on implementation of the ADA and the Civil Rights Act of 1991. During June 1992, EEOC held intensive week-long training sessions on both laws for 1,400 field managers, supervisors, attorneys, and investigators in preparation for the ADA effective date of July 26, 1992.[83]

In its implementation document, EEOC also stated that it would develop and implement a significant outreach and public education program.[84] This would include development of a wide range of informational materials, including pamphlets and brochures on the basic statutory requirements. The target audience of this information would be both employers and disabled job applicants and employees. These informational materials would also be available in alternative formats to make them accessible to individuals with disabilities.[85]

EEOC proposed to disseminate the information to public media and to specialized communications media of employer and disability rights-oriented organizations. The plan also stated that EEOC staff would provide information on the ADA through participation in conferences, workshops, and meetings of these organizations throughout the country. The agency planned to create an exhibit for display at conferences and conventions. EEOC also planned to respond to individual inquiries about the other statutes it enforces through expansion of its existing system. The agency would use the existing toll-free telephone number to provide basic ADA information. Questions that could not be answered by recorded information would be transferred to the nearest field office for a personal response. EEOC staff would be trained to provide accurate and responsive information and also be equipped to refer employers and others to appropriate specialized sources of information. This information could provide assistance in making accommodations and in meeting other compliance requirements.[86]

After the title I implementing regulations were issued in July 1991, EEOC stated in the technical assistance plan that information and outreach programs for employers and individuals with disabilities would be expanded. The required technical assistance manual was to be one source of such increased guidance on the ADA.[87]

EEOC conducted a comprehensive outreach and public information and education program. The ADA speakers bureau provided, on request, trained speakers from headquarters and the field offices to explain the ADA. From July 1990 through September 1992, EEOC staff made more than 1,675 presentations to a wide range of business and trade associations and disability rights organizations. In fiscal year 1992, Office of Legal Counsel staff made more than 250 presentations on the ADA to a wide range of organizations.[88] In fiscal year 1991, the field offices made 305 presentations on the ADA. During fiscal year 1992, field office staff made 1,061 ADA presentations before 150,000 people, while headquarters staff made 250 ADA presentations before 30,750 people. The field office personnel also held briefings and other meetings with employers and community groups to educate them and establish contact.[89]

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[77] Ibid.

[78] Ibid., p. 4.

[79] See chap. 3 for a detailed discussion of staff training.

[80] EEOC, *FYs 1991 and 1992 Annual Report*.

[81] Ibid. p. 25.

[82] EEOC, *FY 1990 Annual Report*, p. 8; EEOC, *FYs 1991 and 1992 Annual Report*, p. 12.

[83] EEOC, "EEOC's Implementation of Title I of the ADA," p. 6.

[84] Ibid., p. 7.

[85] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,241.

[86] Ibid.

[87] Ibid.

[88] EEOC, "Implementation of Title I," pp. 10, 12.

EEOC also published a resource guide, "Library Resources on the Employment of Individuals with Disabilities." This guide described ADA materials (books, periodicals, videos) that had been collected and made available in EEOC's library in November 1990.[90] EEOC also upgraded its toll-free telephone system to deal with the 30 percent increase in the monthly average to 6,500 calls.[91] Calls through EEOC's toll-free system to the caller's nearest EEOC field office increased from a monthly average of 11,000 to an average of 15,000 calls per month. The toll-free service continues to play a significant role in helping employers, employees, and job applicants obtain information on their responsibilities and rights under the laws enforced by EEOC, including the ADA.[92] From October 1991 to October 1992, EEOC established a special ADA helpline as part of its toll-free service.[93] In addition, EEOC's Office of Communications and Legislative Affairs recorded 14,824 ADA-related calls for information during the second quarter of fiscal year 1992. During the same period, the agency received approximately 5,100 mail requests for ADA materials.[94]

Callers to the helpline have had mixed experiences. One disability professional wrote, "EEOC hotline staff is generally friendly and informative if you can wait long enough for them to get back to you."[95] Another wrote, "Our staff have used the EEOC . . . hotline but found the process to be very slow and cumbersome, placed on hold waiting for assistance."[96]

During this period, the Office of Legal Counsel's attorney-of-the-day service provided legal and policy advice to an increasing number of callers. The service handled about 200 calls weekly, and two-thirds concerned the ADA. In the 2 years of the initial implementation phase, the Office of Legal Counsel responded to approximately 2,000 inquiries from a variety of sources, including private attorneys, counsel for State and local governments, law enforcement agencies, public interest law groups, universities, and national, State, and local legislators.[97]

Because of an overwhelming volume of requests for technical assistance and educational materials, most related to the ADA, EEOC's Office of Legislation and Communication Affairs established an EEOC Publications and Distribution Center to provide distribution services for these materials.[98] Before establishing the center, EEOC had used a number of distribution sources including the Department of Education-funded disability business and technical assistance centers (DBTACs), but these resources were insufficient to meet the demand for publications and ADA informational materials. Therefore, the agency entered into an interagency agreement with the Environmental Protection Agency (EPA) for warehouse facilities and for distribution of EEOC informational materials.[99] The agency was able to improve its distribution response on publication requests from a 1-week turnaround to 48 hours guaranteed. The Acting Director of the Office of Communications and Legislative Affairs stated that staff periodically test the efficiency of the distribution system, and the average response rate to a telephone publication request actually is 24 hours. Since the Publications and Distribution Center was established, it has distributed more than 2 million documents on ADA.[100]

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[89] Ibid., p. 7.

[90] EEOC, *Library Resources on the Employment of Individuals with Disabilities, 2nd edition, December 1991.*

[91] EEOC, *FY 1990 Annual Report*, p. 11.

[92] EEOC, "Implementation of Title I," p. 8.

[93] Ibid., pp. 7–8, 10.

[94] Ibid., p. 7.

[95] Carl Suter, Associate Director, Office of Rehabilitation Services, Illinois Department of Human Services, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 9, 1998, attachment, p. 6.

[96] Amy Maes, Director, Client Assistance Program, Michigan Protection and Advocacy Service, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 30, 1998, attachment, p. 5.

[97] EEOC, "Implementation of Title I," pp. 7,10.

[98] Ibid., p. 8.

[99] William White, Acting Director, Office of Communications and Legislative Affairs, EEOC, interview in Washington, DC, Dec. 5, 1997 (hereafter cited as White interview).

Early in fiscal year 1992, EEOC opened a new training center in headquarters to accommodate training activities and special events for up to 180 individuals or provide space for four simultaneous events. The center was mandated by a provision in the Civil Rights Act of 1991,[101] but it has been used extensively for ADA training.[102] EEOC staff also aided the ADA technical assistance efforts of many other Federal agencies and private organizations. EEOC staff worked closely with the ADA Technical Assistance Working Group, which was chaired by DOJ. EEOC staff reviewed training modules for the Rehabilitation Services Administration, which were designed to train rehabilitation and independent living professionals on the ADA and its effect on vocational rehabilitation, client assistance, and independent living programs. Ongoing technical assistance and/or onsite training was provided to Federal employees at the Small Business Administration, the Centers for Disease Control, the Department of Health and Human Services' National AIDS Program Office, the Department of Education's Office for Civil Rights, and the Department of Labor's Office of Federal Contract Compliance Programs.[103]

In April 1992, EEOC headquarters staff held three briefing sessions for congressional staff on responding to constituent requests for information on the ADA. In July 1992, the agency distributed an ADA information kit to more than 2,000 congressional offices on guidance and information to assist staff in responding to constituent inquiries on the ADA. Included in the information kit were a copy of the ADA technical assistance manual, the ADA handbook, and other ADA-related EEOC publications.[104] Further, in June 1992, EEOC distributed an insert on ADA in the Internal Revenue Service's quarterly mailing to approximately 6 million employers. The insert informed employers of the effective dates and basic requirements of the ADA and the availability of the ADA technical assistance manual.[105] EEOC also made mass mailings to the major civil rights groups to inform them about the ADA.[106]

In fiscal year 1992, EEOC conducted, with professional assistance, a nationwide needs assessment to develop a comprehensive technical assistance plan.[107] The needs assessment focused on the statutes that EEOC enforces, including the ADA. The resulting technical assistance and outreach plan included:

- defining target audiences, objectives, barriers (cultural, legal and economic) and tactics that overcome such barriers;
- unifying messages and themes that support EEOC's enforcement intent;
- recommending the mix of sustained outreach vehicles and products and dissemination models, including analysis of the utility of existing training and education materials;
- establishing a strategy for national, regional, and local collaboration activities with business, trade, and community-based organizations representing the cultural and social interests of potential charging parties, thus leveraging additional resources for national educational and technical assistance activities; and
- developing evaluation criteria.[108]

The goal of the needs assessment was to improve the effectiveness of EEOC's educational and outreach efforts and the technical assistance program.[109]

In its proposed technical assistance plan, EEOC stated that it would develop a public service announcement (PSA) on the ADA to be distributed to radio and television stations.[110] However, the Acting Director of the Office of Communications and Legislative Affairs said that EEOC did not, in fact, produce a PSA. The office researched the feasibility of a national multimedia PSA campaign on the ADA but found that funds were not available to meet the anticipated $400,000 cost.[111] Disability professionals contend that increased use of PSAs is necessary to inform the general public about the ADA. For instance, one disability professional wrote: "the need for public knowledge continues to be an issue. The use of media should be increased for public announcements, to all agencies and the general public. This is an area that needs work, because the discrimination complaints based on disabilities are still there."[112] Another wrote, "The dissemination of information has been excellent. However, some businesses, employers and members of the general public are still not aware of the ADA and its provisions. Simple and informative public service announcements might be helpful as well as presentations or booths at certain employer or human resources conventions."[113]

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[100] Ibid.

[101] *See* 42 U.S.C. § 2000 e–4 (1994).

[102] EEOC, "Implementation of Title I," p. 6.

[103] Ibid., pp. 10–11.

[104] Ibid., p. 12.

[105] Ibid., p. 11.

[106] White interview.

[107] EEOC, "Implementation of Title I," p. 12.

[108] Ibid., p. 13.

[109] Ibid., p. 12.

[110] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,241.

The intensive work necessary to prepare for implementing the ADA without additional staffing resources placed a substantial burden on EEOC. The statutory mandate to provide technical assistance for the implementation of the ADA required a tremendous effort by EEOC staff responsible for providing guidance and coordination under the agency's other legal authorities.[114]

After the ADA became effective, the legal policy function for the ADA was placed in the Office of Legal Counsel. The technical assistance function was moved to what is now the Office of Field Programs (the former Office of Program Operations). The plan was to train the Office of Field Programs staff on the ADA so that they could do outreach at the local level. A series of training programs was held for field personnel on ADA. The first was in December 1991 and the most recent was completed in the summer of 1997.[115] Other offices were also responsible for parts of EEOC's technical assistance program, including the Office of Communications and Legislative Affairs, which was responsible for the toll-free information helpline and the publications and distribution center. That continues to be how the technical assistance functions are organized within EEOC.[116]

Funding

EEOC officials said that funding for technical assistance for the implementation of the ADA was limited. However, in fiscal year 1991, the agency was appropriated $1,000,000 to begin the statutorily required preparations for implementing section 506 of the ADA, which mandated the technical assistance program. Further, EEOC received a 1-year supplemental appropriation of $3,630,000 in fiscal year 1991. In fiscal year 1992, EEOC was appropriated $4,044,000 and 32 additional staff persons for ADA implementation, as well as a supplemental appropriation of $1,000,000 which was available through fiscal year 1993. Despite additional funding in fiscal year 1992, EEOC stated that it experienced a fiscal crisis due to years of underfunding in the 1980s and the enactment of the Civil Rights Act of 1991, for which no additional implementation funds were appropriated that year.[117]

To deal with the implementation demands of both new laws, EEOC stated that it "was forced to reallocate its resources."[118] Since 90 percent of its funding was allocated to such nondiscretionary costs as salaries, rent, communications, and utilities, only 10 percent of the funding was available for discretionary costs, such as litigation support, travel, and training.[119] However, EEOC was able to establish the new program initiatives in headquarters "by streamlining certain headquarters functions and shifting slots from those programs that the agency considered to be duplicative."[120] The shift of slots permitted EEOC to support such initiatives as the staffing of the ADA Services Unit.[121]

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[111] White interview.

[112] Kathy Ertola, Assistant ADA Coordinator, California Department of Social Services, letter to Nadja Zalokar, Americans with Disabilities Act Project, Director, USCCR, May 26, 1998, p. 2 (hereafter cited as Ertola letter).

[113] Ringer letter, attachment, p. 2.

[114] EEOC, "Implementation of Title I," p. 4.

[115] Linda Lawson, Operations and Policy Specialist, Office of Field Programs, EEOC, interview in Washington, DC, Dec. 23, 1997 (hereafter cited as Lawson interview).

[116] White interview.

[117] EEOC, "Implementation of Title I," p. 16.

[118] Ibid.

[119] Ibid.

[120] Ibid., p. 17.

[121] Ibid.

Technical Assistance Revolving Fund and the TAPS Program

In October 1992, the EEOC Education, Technical Assistance and Training Revolving Fund Act of 1992 was signed into law.[122] The new law amended title VII of the Civil Rights Act of 1964 to establish a revolving fund for use by the EEOC in providing technical assistance, training, and education to the public on the laws it enforces.[123] Initial startup funding was provided by a one-time transfer of $1 million from EEOC's salaries and expenses account to the fund. The fund subsequently was supported, like other governmental revolving funds, by collections and payments from recipients of technical assistance training and materials.[124]

The fund supports the technical assistance program seminars (TAPS), which are conducted primarily by field office personnel.[125] Generally, the TAPS programs consist of 1-day seminars for groups that can afford to reimburse the government. Thus, the audience usually is employer groups. EEOC officials stated that these seminars are not at the expense of "no cost" training and technical assistance that the agency has been doing on ADA; EEOC's revolving fund activities have amounted to approximately $4 million over the life of the program thus far.[126]

Although the fund is not self-sustaining, it generates sufficient funds to reimburse EEOC for staff time required to do ADA training. During the last 2 years, the fund has become increasingly self-sustaining. With the additional funds, the Office of Field Programs has been able to fund travel, printing, and supplies for outreach to groups who cannot afford to pay for the training. The additional funding also permits the Office of Field Programs to send staff to locations farther from field offices to do training on ADA.[127]

EEOC hired a business consultant to advise it on how to manage and market the TAPS programs. Focus groups were convened, and 20,000 letters were sent to various groups and individuals to determine what type of technical assistance and outreach programs the agency's stakeholders wanted and needed. The priority need for the respondents was training videos with leader and participant guides.[128]

TAPS training has no set agenda; the programs can cover any of the laws that EEOC enforces. A staff inventory of all of the TAPS seminars had more than 7½ pages of ADA topics, making it the most covered specific topic. The field staff does more TAPS programs on the ADA than any other specific topic or law that EEOC enforces.[129]

The current cost of a full-day TAPS program is $199 per person.[130] The seminar must have a minimum of 100 participants to reach the break-even point. Those attending the seminars also receive resource books providing them with the relevant information on the topic of the seminar.[131] Half-day seminars cost $75 or $50, depending on the amount of materials or resource books furnished to the participants.[132] More recently, the field staff has been holding TAPS seminars at employers' worksites.[133] Several disability professionals noted that the cost of the TAPS programs was high relative to their agencies' budgets. For instance, a representative of the Department of Social Services for the State of California wrote, "[t]he chief of our EEOC office has attended seminars conducted by EEOC and feels they are very informative. Unfortunately, the fee tends to be costly (approx. $200) a person, and it is impossible to send all EEOC investigators, which would be ideal."[134]

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[122] Pub. L. No. 102–411, 106 Stat. 2102 (codified at 42 U.S.C. § 2000e–4 (k) (1994)).

[123] *Id.*

[124] EEOC, "Implementation of Title I," p. 13.

[125] Lawson interview.

[126] White interview.

[127] Paula Choate, Director, Field Coordination Programs, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 2, 1998 (hereafter cited as Choate interview).

[128] Ibid.

[129] Ibid.

[130] EEOC, Cost of Technical Assistance Program Seminars (TAPS), prepared January 1998.

[131] Choate interview.

[132] EEOC, Cost of Technical Assistance Program Seminars (TAPS), prepared January 1998.

[133] Choate interview.

[134] Ertola letter, p. 3. Ms. Ertola also indicated that the costs of EEOC brochures were high for State agencies. She indicated that "[w]hen calling the local EEOC, we were informed that a brochure is available, and the fee for the materials is $75.00. State agencies don't always have the funds available for materials, and it is disappointing that some kind of tax dollar should cover this for state agencies." Ibid. Another

Many disability advocates and professionals say that small businesses are not informed of their obligations under the ADA. For example, one disability professional wrote, "Large companies may know something about the ADA, but small businesses know very little. . . ."[135] Recently, the Office of Field Programs has made efforts to conduct TAPS training programs so that they are more affordable for small employers. The Office of Field Programs has used the half-day seminars or has held programs for smaller groups, offsetting the costs with larger seminars for other groups. EEOC also gives the participants of the half-day seminars a full set of the resource books, which helps them to gain the information on ADA and the other laws that EEOC enforces. Outreach to small business employers initially was not as great as it should have been, EEOC staff acknowledges, and[136] the field office staff is trying to remedy that now with more innovative use of the TAPS program.

The TAPS seminars are evaluated for effectiveness. Participants are asked to fill out an evaluation form at the conclusion of each seminar. On the forms, participants are asked, among other things, what technical assistance products would be helpful to them. If a participant is attending a second seminar, he or she is asked what information was helpful at the previous seminar.[137] This information is used to gauge the effectiveness of the presentations by Office of Field Programs staff and staff in the district office that presents the TAPS program.[138] The revolving fund's business plan will outline additional products and services that will address the needs of smaller employers.[139]

ADA Outreach, Education, and Technical Assistance—Fiscal Year 1993 to Present

After the ADA was implemented in July 1992, the ADA technical assistance functions were dispersed to the Office of Communications and Legislative Affairs, the Office of Legal Counsel, and the Office of Field Programs. After 1992, there was less emphasis on the ADA as a separate component of EEOC's overall technical assistance program, and field office staff became the group primarily responsible for technical assistance at EEOC.[140] However, ADA still was the most frequently requested topic in the education and outreach programs conducted by staff,[141] although it is declining. In fiscal year 1992, the ADA represented 49 percent of the topics covered in technical assistance programs. In fiscal year 1993, ADA represented 32 percent of the topics discussed, and by fiscal year 1994 the ADA had declined to only 24 percent of the topics. In fiscal year 1995, the ADA represented 22 percent of the topics, and the ADA represented only 12 percent and 11 percent, respectively, in fiscal years 1996 and 1997. A staff member said that although the percentage of ADA presentations had declined in this period, she thought that, in the last 18 months, the field staff were doing substantially more presentations, so that the actual number on ADA had remained the same or increased.[142]

In fiscal year 1993, the first full year of ADA's enforcement, EEOC staff provided extensive education and technical assistance in support of the ADA.[143] That same year, the Office of Legal Counsel issued interim enforcement guidance interpreting ADA's application to disability-based provisions in employer health plans. As a result, Office of Legal Counsel staff provided extensive information about and interpretation of these ADA provisions and other parts of the law in response to hundreds of written and telephonic inquiries. Staff also made speeches and other presentations on ADA throughout the year. The Office of Legal Counsel made over 100 public presentations on the ADA to a diverse

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disability professional wrote, "To my knowledge, we have been invited to only one seminar and although I have forgotten the price, the amount seemed expensive per person." Kayla A. Bower, Executive Director, Oklahoma Disability Law Center, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 6, 1998, attachment, p. 3.

[135] Martin letter, attachment, p. 7.

[136] Choate interview.

[137] Ibid.

[138] Julie Bowman, Enforcement Supervisor, Chicago District Office, EEOC, telephone interview, Apr. 8, 1998.

[139] *See* EEOC Comments, July 17, 1998, p. 5.

[140] Lawson interview.

[141] Choate interview.

[142] Lawson interview.

[143] EEOC, *FY 1993 Annual Report*, p. v.

group of organizations representing private and public employers, management and human resources professionals, attorneys, the disability community, and medical and many other specialized groups. Through its attorney-of-the-day service and ADA staff, the Office of Legal Counsel provided legal and policy interpretations on the ADA to an average of 200 callers weekly. The staff also provided ongoing support and technical assistance to the DBTACs and to staff in other Federal agencies, such as the Department of Health and Human Services, Small Business Administration, Centers for Disease Control, and others.[144] Fiscal year 1993 was the first year of operation of the Publications Distribution Center, which distributed almost 1.6 million publications.[145] In addition, according to a 1995 EEOC report, because of concerns expressed by certain groups, Congress mandated in the agency's fiscal year 1992 appropriation law that it conduct outreach and education to historically underserved groups such as Hispanic Americans, Asian/Pacific Islander Americans and Native Americans.[146]

Most of the outreach and education efforts are done by EEOC's field offices. Selected field offices began a pilot program in fiscal year 1993 to institutionalize and coordinate comprehensive technical assistance, outreach, and education programs; to establish a standardized approach to internal development and delivery of training to EEOC staff and the general public; and to provide a specific point of internal coordination of special activities throughout the field.[147] Six districts participated in the pilot program, and a new position of program analyst was created to work with the district director on it. The pilot program was successful and has been extended to all of the district offices.[148] In fiscal year 1993, ADA was the most frequently presented topic at the field outreach and education activities. An overview of EEOC's enforcement program, including the ADA, was the most frequent agenda item for the presentations.[149]

A focus of EEOC's outreach program in fiscal year 1994 was an effort to alert the public and the media of the expanded coverage of the ADA, which took place on July 26, 1994. Employers with 15 to 24 employees were now covered under the statute.[150] EEOC increased contact with both the print and the electronic media, disability rights organizations, small business trade associations, and Small Business Administration field offices. The Publications Distribution Center mailed 509,721 ADA-related publications.[151] In addition, Office of Legal Counsel staff made over 90 presentations on title I of the ADA at conferences and seminars sponsored by a broad range of organizations, associations, and governmental agencies, including many disability rights groups.[152] ADA continued to be the single most frequently addressed topic in the field outreach activities.[153]

By fiscal year 1995, the ADA technical assistance program was integrated into the agency's overall technical assistance and outreach efforts. In the field, ADA continued to be the single topic most frequently addressed.[154] Field staff made presentations to more than 65,000 people who attended over 1,100 presentations. Almost 40 percent of EEOC's presentations were made to professional organizations for attorneys, human resources professionals, business owners, and employers. Staff in the Office of Legal Counsel also made presentations to various groups on a number of topics, including the ADA. The ADA Division held monthly meetings with attorneys from the Departments of Justice, Labor, Education, and Health and Human Services to facilitate discussion on the ADA. Further, when attorneys from the Office of Legal Counsel go to the field to hold a TAPS seminar, they try to arrange either to give training to the staff in the field office or arrange to give a free seminar to a group in the same locale who cannot afford to pay for a TAPS seminar. This permits Office of Legal Counsel staff to maximize the agency's limited resources for technical assistance.[155]

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[144] Ibid., p. *13*.

[145] Ibid., p. 16.

[146] EEOC, *Technical Assistance and Education in EEOC, The Role of the Office of Program Operations*, Report to the Commission, Jan. 10, 1995, p. 4.

[147] Ibid., pp. 1–2.

[148] Ibid., pp. 2–5.

[149] EEOC, FY 1993 & FY 1994 Outreach Activities, Pie Charts.

[150] For the preceding 2 years, employers with fewer than 25 employees were not covered under the ADA. *See* 42 U.S.C. § 12111 (5) (A) (1994).

[151] EEOC, *FY 1994 Annual Report*, p. 29.

[152] Elizabeth M. Thornton, Deputy Legal Counsel, Office of Legal Counsel, EEOC, memorandum to Cynthia Clark Matthews, Director, Office of Equal Employment Opportunity, re: Accomplishments of the Office of Legal Counsel Regarding Individuals with Disabilities for FY 1994, Dec. 21, 1994.

[153] EEOC, FY 1993 & FY 1994 Outreach Activities, Pie Charts.

[154] EEOC, Office of Program Operations, *FY 1995 Annual Report*; Education, Technical Assistance and Outreach, p. 15.

Concerns about the effectiveness of EEOC's education, outreach, and technical assistance efforts were raised in a 1995 congressional oversight hearing. In testimony before the Committee on Labor and Human Resources of the United States Senate, a General Accounting Office representative stated that EEOC "has direct contact with a small portion of the millions of workplaces and workers in the United States,"[156] and noted that EEOC devoted relatively few resources to outreach and technical assistance activities.[157]

Local Enforcement Plans

In July 1996, the National Enforcement Plan was implemented, and it required each field office to develop a technical assistance and outreach component as part of its Local Enforcement Plan (LEP). Most of the LEPs identify specific ADA outreach and technical assistance programs; however, a few do not specifically target the ADA. For example, the Seattle District Office will focus on reasonable accommodation of persons with disabilities. Also, disabilities such as diabetes and multiple sclerosis (MS) and the impact of rotating shift work, overtime, and the need for frequent snacks or breaks are areas to be addressed, because there is a high incidence of MS in the North Western States.[158] The Philadelphia District Office agreed to do four programs for "Inside Government," a radio program in Philadelphia that covers Federal agencies and the services they provide. Two shows were to be on ADA.[159] The New York District Office planned to hold a seminar on the ADA and reasonable accommodation for EEO officials, personnel specialists, and human resource managers, to provide a greater awareness of ways to employ individuals with disabilities by providing effective reasonable accommodations.[160]

The Memphis District Office stated that outreach efforts would be directed toward educating employers on their responsibilities in the areas of reasonable accommodation and questions involving terminal illness.[161] The Los Angeles District Office LEP noted that of the 8.8 million people in the County of Los Angeles, approximately 19 percent, or 1.6 million, are individuals with disabilities. The office planned to organize an educational focus group to develop an action plan.[162] The plan for the Dallas District Office stated that the feasibility of developing and producing videotapes for very small employers on disability accommodations, among other topics, would be explored.[163]

The Indianapolis District Office identified two employment practices related to ADA that were the subject of recurrent charges of discrimination. The first dealt with applicants being disqualified for employment after post-offer medical examinations and the other involved speculative predictions of harm as a result of prior existing medical conditions or asymptomatic predispositions to possible future impairments. The LEP noted that respondents had relied on advice from occupational medical specialists unaccustomed to the requirements of the ADA. The office stated that it planned to contact associations of occupational medical personnel and offer to conduct training on the ADA.[164]

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[155] Kathleen Courtney, Office of Legal Counsel, Coordination and Guidance Programs/ADA, interview in Washington, DC, Dec. 5, 1997.

[156] *Hearing before the Senate Comm. on Labor and Human Resources*, 104th Cong. 36 (May 23, 1995) (statement of Linda G. Morra, Director, Education and Human Resources Division, GAO).

[157] Ibid.

[158] EEOC, Seattle District Office, "Local Enforcement Plan for Fiscal Years 1996 & 1997," August 1996, p. 3.

[159] EEOC, Philadelphia District Office, "Local Enforcement Plan," section A, p. 5.

[160] EEOC, New York District Office, "Local Enforcement Plan," August 1996, p. 14.

[161] EEOC, Memphis District Office, "Local Enforcement Plan," July 1996, p. 5.

[162] EEOC, Los Angeles District Office, "Local Enforcement Plan," First Edition 1996–1997, p. 9.

[163] EEOC, Dallas District Office, "Local Enforcement Plan," May 1996-September 1997," p. 11 (hereafter cited as EEOC, Dallas District Office LEP).

The Detroit District Office established an ongoing working relationship with the Michigan Protection and Advocacy Service to discuss potential charges of discrimination. The staff also actively participated in the conference of the President's Committee on Employment of People with Disabilities, which was held in Detroit in May 1996.[165] The Charlotte District Office noted that the ADA was:

> without a doubt the least understood statute administered by EEOC. The concept of a disability, the requirements concerning medical exams and records, the duty to provide a reasonable accommodation and the treatment of communicable diseases are widely misunderstood.[166]

The LEP further noted that there were serious differences between the South Carolina disability law and title I of the ADA, which led to a misunderstanding of the Federal law. The LEP planned to address these issues through TAPS programs and through providing speakers, when requested, to employer and professional groups.[167]

The San Antonio District Office identified disability discrimination, especially cases involving terminal or degenerating illnesses, egregious discriminatory conduct, and reasonable accommodation as focal topics of its training program. These were identified by a review of the inventory of cases and feedback from stakeholders. However, the LEP did not identify specific outreach efforts to deal with this issue.[168] The Milwaukee District Office said that it and the Minneapolis Area Office take in a higher percentage of disability charges than most EEOC offices, but most of the charges are from disabled persons in metropolitan areas. The office stated that it wanted to be sure that employment opportunities are available to all citizens within its jurisdiction regardless of where they live.[169] Specific ADA-related outreach efforts included a series of speeches in Wisconsin and Minnesota.[170]

Education and technical assistance to diverse disability groups has been an integral part of the Miami District Office's outreach program since 1993. Its LEP noted that the office had worked jointly with many groups from the disabled community to provide information about the ADA to employers and the public. The LEP proposed to establish a stakeholder committee for the disabled to enhance the office's outreach activities.[171] The Albuquerque District Office identified persons with disabilities among its targeted populations for outreach. During the second quarter of fiscal year 1997, the office planned one outreach activity related to ADA, a seminar with all department heads at New Mexico State University in Las Cruces.[172] Individuals with disabilities were also identified as a targeted population by the Phoenix District Office. A number of strategies for addressing its outreach program were described in the Local Enforcement Plan, but only one was described as an ADA-related effort—working with advocacy organizations, e.g., the Arizona Center for Disability Law, to coordinate training activities.[173]

Headquarters and Field Office Management of ADA Technical Assistance Programs

The management and functions of EEOC's technical assistance programs are diffused throughout EEOC. Two offices are primarily responsible for EEOC's technical assistance programs: the Office of Communications and Legislative Affairs, which is responsible for the publications and distribution operations and the toll-free information line, and the Office of Field

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[164] EEOC, Indianapolis District Office, "Local Enforcement Plan," June 28, 1996, Section A.

[165] EEOC, Detroit District Office, "Local Enforcement Plan," pp. 7–8.

[166] EEOC, Charlotte District Office, "Local Enforcement Plan," section A, Outreach, p. 10.

[167] Ibid., section A, Outreach, pp. 6, 10.

[168] EEOC, San Antonio District Office, "Local Enforcement Plan," section A, pp. 4–5.

[169] EEOC, Milwaukee District Office, "Local Enforcement Plan," July 1, 1996, p. 4 (hereafter cited as EEOC, Milwaukee District Office LEP).

[170] Ibid., pp. 8–9.

[171] EEOC, Miami District Office, "Local Enforcement Plan", p. 7 (hereafter cited as EEOC, Miami District Office LEP).

[172] EEOC, Albuquerque District Office, "Local Enforcement Plan," section A.

[173] EEOC, Phoenix District Office, "Local Enforcement Plan," section A, pp. 2, 4.

Programs, which is responsible for the local technical assistance and outreach programs, including the TAPS seminars funded by the revolving fund. In addition, some other aspects of the agency's technical assistance program are carried out by other offices such as the library, which is responsible for EEOC's Web site. In interviews, staff acknowledged that there is no technical assistance staff in EEOC that is comparable to the unit in DOJ's Disability Rights Section,[174] where the Department's ADA technical assistance function is consolidated.

EEOC's Commissioners acknowledge the importance of the technical assistance efforts to the successful implementation of the ADA. Former Chairman Gilbert Casellas cited technical assistance as one of the three ADA areas in which EEOC has had significant accomplishments. He noted that EEOC had increased the number of technical assistance seminars in fiscal year 1997 to approximately 70, a 50 percent increase from the previous year.[175]

In a 1998 statement before Congress, Acting Chairman Igasaki said that while EEOC has been able to devote only a small portion of its budget to outreach and education activities, the agency has found that these programs have been invaluable in communicating what and who is covered by Federal equal employment laws. In order to get the most from its limited funds, EEOC has actively sought ways to expand its outreach activities through creative and cost-efficient strategies and techniques. For example, he said, to get information to small businesses, which are not always able to purchase information-based products or to attend seminars, EEOC created a special Web site with information targeted for the small business owner. The Acting Chairman said that EEOC's free and fee-paid outreach programs were attended by almost 100,000 individuals in fiscal year 1997. He noted that there were plans for the future development of direct sale items to reach those who cannot afford to access EEOC's technical assistance programs and for expanded activities for underserved groups and communities.[176]

Commissioner Reginald Jones said that he thought that outreach and technical assistance are important for all statutes. In fact, he noted that in the EEOC strategic plan, outreach and education have the same priority as litigation. Commissioner Jones also stated that the EEOC conducted a lot of outreach programs to educate the public about the ADA.[177]

Commissioner Paul Stephen Miller said that technical assistance, outreach, and education are critical to EEOC's mission. He said that discrimination cannot be eradicated simply by enforcement and processing charges. In his opinion, EEOC must provide training to give employers a network for getting answers to questions. At the same time, it is also important to inform the public about their rights. According to Commissioner Miller, while technical assistance is not a central driving force in what the agency does, it is important. EEOC's technical assistance efforts complement those of other organizations that provide technical assistance on the ADA. Commissioner Miller said the goal of technical assistance should be to eliminate discrimination and he would like to see EEOC do a better job in outreach.[178]

EEOC's Legal Counsel said that Office of Legal Counsel staff does more travel for technical assistance and outreach purposes on ADA than any other law that EEOC enforces. She noted that participation in seminars and meetings fosters an informal network of communication. However, technical assistance is delivered principally through the district offices and is required in their LEPs. The district offices are held accountable, she said, for outreach and technical assistance. She believes that the decentralized approach works well.[179] The Director of the Office of Legal Counsel's ADA Division said that his organization provides technical assistance to field staff on ADA in addition to requests for information from outside EEOC. Each field office has an ADA policy contact in the Division. The staff also does public speaking on ADA to a wide variety of groups as part of the Office of Legal Counsel's outreach responsibilities.[180]

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[174] White interview.

[175] Gilbert Casellas, Chairman, EEOC, interview in Washington, DC, Dec. 1, 1997.

[176] *Hearing before the Subcomm. on Commerce, Justice, State, The Judiciary and Related Agencies of the House Comm. on Appropriations*, 105th Cong. 2 (Apr. 1, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

[177] Reginald Jones, Commissioner, EEOC, interview in Washington, DC, Apr. 1, 1998.

[178] Paul Steven Miller, Commissioner, EEOC, interview in Washington, DC, Apr. 7, 1998.

[179] Ellen Vargyas, Legal Counsel, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 8, 1998.

The Director of the Office of Field Programs explained that the three offices are doing different things with respect to EEOC's technical assistance program. The Office of Communications and Legislative Affairs has a national perspective on EEOC's outreach program. The field offices deal with outreach in terms of their jurisdictional and geographical areas, and the Office of Field Programs oversees the activities of the field offices and reviews how these fit into the National Enforcement Plan. Office of Legal Counsel staff members speak on issues as requested.[181] There is extensive coordination between the Office of Field Programs and the Office of Communications and Legislative Affairs, because the Office of Communications and Legislative Affairs is responsible for national publications. A headquarters office for outreach, she said, would be a problem because it would not have jurisdiction over the field offices.[182] Eventually, EEOC hopes to implement a national outreach plan, once the LEPs are in place. This will permit the agency to identify the areas of technical assistance that need strengthening. Local offices tell headquarters where outreach is needed, so the Office of Field Programs does not direct the offices.[183] However, the Director of Field Coordination Programs stated that she now has an outreach coordinator on her staff who coordinates field technical assistance activities with staff in the Office of Legal Counsel and the Office of Communications and Legislative Affairs. She hoped with future money generated by the revolving fund to put one outreach coordinator in each field office.[184]

In July 1997, EEOC held its first national conference for EEOC staff engaged in outreach. A conference on the revolving fund was scheduled for August 1998. In addition, EEOC disseminates a newsletter to all offices that includes information on field office outreach activities. This permits staff to borrow ideas from each other.[185] Finally, field staff mentioned that each field office outreach contact point files a quarterly report on outreach and education activities covering all presentations made, stratified by category, and listing the particular groups that were reached.[186]

Several field offices planned to use the local media to publicize EEOC's programs and the laws it enforces, including ADA, either with appearances by staff on public affairs shows or PSAs. Additionally, a few field offices have indicated plans for producing PSAs and videos. These include the following:

- The Los Angeles District Office planned to produce PSAs in English, Spanish and Asian languages that would run on television and radio stations and in the print media.[187] The office also has an orientation video for people who file charges. Many of the other offices had similar videos; however, some, like the Boston Area Office, did not.[188]

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[180] Christopher Kuczynski, Director, Americans with Disabilities Act Division, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 8, 1998.

[181] The staff of OLC are the primary spokespersons for the agency on policy matters. They provide policy interpretations as requested. This is distinguishable from the field responsibility for identifying underserved groups, employers, and geographic areas and providing outreach and technical assistance services. *See* EEOC Comments, July 17, 1998, p. 5.

[182] Thornton interview. Since field offices, organizationally, report directly to the Office of Field Programs, superimposing a separate office to handle this single function would bifurcate management. *See* EEOC Comments, July 17, 1998, p. 5.

[183] Thornton interview. Field offices are asked to identify where outreach is needed and submit proposals for addressing these needs within their jurisdictions. The Office of Field Programs reviews these plans and provides appropriate feedback based on overall needs. As such, the Office of Field Programs does not dictate field outreach activities. EEOC Comments, July 17, 1998, p. 5.

[184] Choate interview.

[185] Ed Elizondo, Outreach and Education Coordinator, Dallas District Office, EEOC, telephone interview, Apr. 13, 1998.

[186] Larry Pincus, Program Analyst, New York District Office, EEOC, telephone interview, Apr. 20, 1998 (hereafter cited as Pincus interview).

[187] Los Angeles District Office Local Enforcement Plan, First Edition 1996–1997, p. 10.

[188] Devika Dubey, Investigator, Boston Area Office, EEOC, telephone interview, Apr. 10, 1998.

- The Miami District Office, as part of its strategies for providing EEOC services to underserved communities, plans to produce PSAs for radio and television.[189]
- The Atlanta District Office planned to produce an educational video, using office staff and a task force of stakeholders who will identify topics, write the script, and act. It planned to distribute the joint venture video throughout the district community.[190]
- The San Francisco District Office planned in fiscal year 1997 to hold a series of symposia to educate community groups about equal employment opportunity laws. It planned to market and publicize these events through PSAs and direct mail.[191]
- The feasibility of developing and producing a videotape for very small employers was being explored in fiscal year 1997 by the Dallas District Office. The tape would provide information on correct job interviewing, sexual harassment, and religious and disability discrimination.[192]
- The Milwaukee District Office planned to contact local advertising councils to seek their help in producing PSAs throughout its three-State jurisdiction. The plan was to have the first PSAs aired in fiscal year 1997.[193]

In carrying out their technical assistance and outreach responsibilities, the field offices have a significant amount of flexibility and discretion. A regional attorney in the Los Angeles District Office noted that the Office of Field Programs has allowed the field offices to be creative.[194] As demonstrated above, the district offices' creativity does appear to have resulted in some very innovative approaches to outreach, especially in light of EEOC's limited resources. As an example of the creative efforts of the field office technical assistance efforts, the New York District Office had developed a brochure explaining the laws that EEOC enforces but oriented toward its immigrant population. It was published in seven languages and was distributed by the Office of Field Programs to district offices with large immigrant populations.[195] The New York District Office also published a "know your rights brochure" for distribution at outreach programs.[196] Recognizing these innovations, Acting Chairman Igasaki directed the Office of Field Programs to make available to *all* field offices the most useful information that has been developed by the various offices. The Acting Chairman also directed the Office of Communications and Legislative Affairs to take the lead in developing information packets, videos, and questionnaires for distribution to the public.[197]

Outreach to Underserved Groups

According to the Director of the Office of Field Programs, some technical assistance programs have been developed for small businesses, for example, half-day TAPS seminars. One-half day seminars have proven attractive to small business because they cost less than full-day seminars. District offices are aware that they need to make an effort to reach small businesses. She noted that earlier in the ADA implementation process, both the Office of Legal Counsel and Office of Program Operations (now the Office of Field Programs), had some programs aimed at small businesses,[198] and added that last year's focus was to reach small businesses by making revolving fund courses cheaper.[199]

EEOC prepared a small business information sheet in conjunction with the National Federation of Independent Business (NFIB) and placed the document on the agency's Web site, which also contains EEOC's policy guidance.[200] The manager of Legislative Affairs at NFIB said that EEOC was interested in reaching out to the small business community and placing the small business information on the Web site was a good example of effective outreach and technical assistance. Although she was unaware of any technical assistance materials prepared by either EEOC or DOJ other than the ADA technical assistance manual, she said the manual was very well done and informative.[201]

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[189] EEOC, Miami District Office LEP, p. 7.

[190] EEOC, Atlanta District Office, "Local Enforcement Plan," revised Aug. 16 1996, p. 3.

[191] EEOC, San Francisco District Office, "Local Enforcement Plan," pp. 5–6.

[192] EEOC, Dallas District Office LEP, p. 11.

[193] EEOC, Milwaukee District Office LEP, p. 12.

[194] Pamela Thomason, Regional Attorney, Los Angeles District Office, EEOC, telephone interview, Apr. 15, 1998 (hereafter cited as Thomason interview).

[195] Choate interview.

[196] Pincus interview.

[197] Paul Igasaki, Acting Chairman, EEOC, operational recommendations made at the Apr. 21, 1998 EEOC meeting.

[198] Thornton interview. *See* EEOC Comments, July 17, 1998, p. 5.

[199] Thornton interview (statement of Linda Lawson).

[200] Mastroianni interview.

Several of the district offices mentioned that they had made efforts to reach out to the small business community. In Los Angeles, staff has made presentations to groups such as chambers of commerce, roundtables, employer groups, and personnel management association meetings.[202] The Chicago District Office recognized that the full-day TAPS programs do not reach the small business community, so in 1997 it held a half-day seminar cosponsored with the Small Business Administration specifically aimed at small businesses. Two more half-day seminars for small businesses were planned for 1998.[203]

EEOC staff acknowledged that EEOC needed to reach the minority disability community, another underserved group.[204] Former Chairperson Gilbert Casellas also acknowledged that EEOC had been told that minorities with the disabilities have a harder time learning about the ADA. He said the National Enforcement Plan is trying to deal with this by addressing intersection cases, those involving discrimination based on age, race, sex, etc., in addition to disability.[205]

Disability is disproportionately higher in the minority community. For example, the presence and prevalence of disability for African Americans is almost twice as high as it is for the general population. Minorities who are disabled are not only faced with issues of discrimination; they also must deal with issues that relate to low socioeconomic status. Minorities tend to live in the least accessible areas of their communities, thus receiving lower levels of health, rehabilitation, and educational services.[206]

In the quarterly meeting of the National Council on Disability in November 1997, Council Member Hughey Walker voiced concerns about outreach to minorities with disabilities because many are unaware of the protections available to them under the ADA. Council Member Ela Yazzie-King raised similar concerns about obstacles faced by individuals with disabilities who speak English as a second language.[207] Alternatively, a staff person at the President's Committee on Employment of People with Disabilities said that both EEOC and DOJ had made a good effort to reach out to minority group members. However, he said there is always room for improvement in this area.[208]

The director of the Research and Training Center at Howard University recently said that the Federal outreach effort had been fairly effective, but she indicated greater familiarity with what DOJ has done than with what EEOC has done. She also said there was still a need to prepare informational and educational materials that target people with low reading skills.[209] The executive director of the National Center for Latinos with Disabilities stated that she had not seen any technical assistance or informational materials on the ADA from either EEOC or DOJ. She said that it would be very helpful to have publications in Spanish.[210]

Because of the mandate to reach underserved groups, the field offices are required as part of the outreach component of their LEP to describe how they plan to reach these groups. Some district offices are more specific than others. For example, the Charlotte District Office has taken a "grassroots" approach to reaching out to minority and other underserved groups through contacts with such groups as the NAACP, human relations commissions, and veterans' groups. The office has also developed contacts with state-affiliated groups that then contact the district office when they need information. In the Charlotte District Office, the Hispanic community is the primary underserved group which is targeted for technical assistance. Because this ethnic group is composed mostly of transient migrant workers, they are difficult to contact, track and educate on a consistent basis. The office attempts to assist these individuals by working with various departments of labor, unions, and school systems.[211]

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[201] Mary Reed, Manager, Legislative Affairs (House Spokesperson), National Federation of Independent Business, telephone interview, Jan. 14, 1998.

[202] Rosa Viramontes, Enforcement Manager, Los Angeles District Office, EEOC, telephone interview, Apr. 10, 1998.

[203] Julie Bowman, Enforcement Supervisor, Chicago District Office, EEOC, telephone interview, Apr. 8, 1998.

[204] Thornton interview.

[205] Gilbert Casellas, Chairperson, EEOC, interview in Washington, DC, Nov. 25, 1997.

[206] USCCR, Briefing on the Americans with Disabilities Act, May 6, 1994, p. 17.

[207] National Council on Disability, Quarterly Meeting, Nov. 6, 1997.

[208] Claudie Grant, Employment Advisor, Office of Plans, Projects and Services, President's Committee on Employment of People with Disabilities, telephone interview, Nov. 19–20, 1997.

[209] Sylvia Walker, Director, Research and Training Center for Access to Rehabilitation and Economic Opportunity, Howard University and Vice Chairperson, President's Committee on Employment of People with Disabilities, telephone interview, Nov. 19, 1997.

[210] Maria Elena Rodriguez-Sullivan, Executive Director, National Center for Latinos with Disabilities, telephone interview, Nov. 25, 1997.

Future of EEOC's Outreach, Education, and Technical Assistance Program

A staff official of the National Council on Disability criticized EEOC's technical assistance because it has primarily benefited employers, who are most able to pay the cost of reimbursement to the revolving fund for TAPS programs.[212] This was acknowledged by several EEOC officials. However, most provided assurances that the TAPS programs, while designed primarily to reach employers on their ADA responsibilities, were not at the expense of the "free" training and technical assistance that EEOC has been doing on ADA.[213]

The Director of Field Coordination Programs, acknowledged that the training and technical assistance programs that are funded by the revolving fund are for groups that have the resources to pay. But the money that is received for the TAPS programs is used to reimburse EEOC for staff time. These funds in turn, she said, are used to provide "free" or "no fee" outreach training to groups who cannot afford to pay.[214] Staff expects to have a better coordinated and planned outreach and technical assistance effort in the future. One focus will be the development of technical assistance products, for example, educational videos with leader and participant guides.[215]

With funding provided by the revolving fund, the goal will be to put one outreach coordinator in each field office who will not only conduct revolving fund programs but will enable other staff members to do more outreach without charging fees. EEOC also wants to experiment with new approaches to providing technical assistance. Each field office has a stakeholder council which it consults, and some send out newsletters to their stakeholders. The goal is to have expanded communications in the field.[216] EEOC will use various communications strategies to reach underserved communities in its outreach programs. As long as there is a requirement that outreach is a component of each LEP, on which field staff is held accountable,[217] there is an assurance that EEOC's commitment to technical assistance will continue. Several EEOC staff members also indicated that with additional resources the agency could do an even more effective job of carrying out its outreach, education and technical assistance responsibilities.[218] The anticipated increase in funding in fiscal year 1999 and the use of funds generated by EEOC's revolving fund may ultimately provide the agency with the resources to expand its outreach, education, and technical assistance programs to all segments of society on all the laws EEOC enforces, including the Americans with Disabilities Act

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[211] Billy Sanders, Technical Assistance Coordinator, Charlotte District Office, EEOC, telephone interview, Apr. 13, 1998. Mr. Sanders said that interacting with the Hispanic communities in the district's target cities (Rocky Mount, NC, and Greenville, Charleston, Florence, Beaufort, and Waterboro, SC), who seem to be victims of "indigenous slavery," is a somewhat depressing task. As sharecroppers, the Hispanic individuals in these communities are charged a fee for renting houses; and they buy their "bosses" supplies from the store. At the end of the week, they can owe their bosses more money than they are paid. Consequently, they are never able to save money. Mr. Sanders has contacted health departments to inspect some of the communities where migrant workers reside. Mr. Sanders has a good relationship with the Department of Labor. According to Mr. Sanders, although he is somewhat limited in jurisdiction, he does monitor geographical areas where people are putting in long hours.

[212] Imparato interview.

[213] White interview.

[214] Choate interview.

[215] Ibid.

[216] Ibid. *See* EEOC Comments, July 17, 1998, p. 6.

[217] Vargyas interview.

[218] White interview.

8 Findings and Recommendations

Since acquiring responsibility for enforcing the Americans with Disabilities Act of 1990 (ADA), EEOC has faced enormous challenges. With responsibility for the ADA and with another major responsibility EEOC acquired at the same time, enforcement of the Civil Rights Act of 1991, came a 38 percent increase in the number of charges of discrimination filed with the agency. The increased workload was not matched by a concomitant increase in budget, resources, or staff. In real dollars, EEOC's fiscal year 1997 budget was 8 percent below its appropriation level for 1989, several years before the ADA went into effect. EEOC also lost staff. Its fiscal year 1997 staffing level of 2,586 FTEs was well below its staff level of approximately 2,800 in the years before the agency acquired responsibility for the ADA. Not surprisingly, EEOC's increased workload in the face of its declining resources resulted in a large increase in EEOC's backlog. EEOC's pending inventory of charges more than 180 days old more than doubled, from 46,000 charges to 98,000 charges, between fiscal years 1991 and 1995.

Over the past several years, EEOC has taken a number of creative and innovative steps to attempt to deal with the reality it faces: an overwhelming workload with insufficient resources. Under the leadership of former Chairman Gilbert Casellas, the agency created several Commissioner-led task forces to conduct a comprehensive review of EEOC's enforcement activities and to make recommendations that would "articulate the vision and chart the course that will take [EEOC] into the 21st century." A principal outcome of these task forces was the implementation, in 1995, of Priority Charge Handling Procedures, which attempted to focus EEOC's limited resources on the most "meritorious" charges. EEOC also began experimenting with using alternative dispute resolution techniques, in particular, mediation, to encourage charging parties and respondents to come to mutually beneficial agreements and to reduce the number of charges that needed investigation. EEOC increased its emphasis on outreach and education and technical assistance to encourage voluntary compliance with employment discrimination statutes. Finally, EEOC attempted to focus its enforcement efforts through the development of its National Enforcement Plan, along with Local Enforcement Plans for each district office.

These innovations have had mixed success in improving EEOC's effectiveness as a civil rights enforcement agency. They undoubtedly can be credited with a major reduction in the agency's backlog by fiscal year 1996. Civil rights advocacy groups and employers alike generally have reacted favorably to the changes. However, EEOC's abandonment of its commitment to do a full investigation of all charges has led to fears among some that individuals with meritorious charges of discrimination may find their charges dismissed without a proper review by EEOC staff and hence be left to fight discrimination on their own. EEOC also has been criticized for expending resources on systemic cases or cases that develop the law that some would argue could be spent better on investigating and conciliating individual charges of discrimination.

During the same time that EEOC has been implementing major changes in its approach to its work, it has developed a highly credible ADA implementation, compliance, and enforcement program. The agency published detailed ADA regulations within 1 year of the law's enactment; provided comprehensive initial training on the statute for all of its staff; set about developing a series of policy documents laying out and explaining its interpretation of controversial or unsettled aspects of the law; provided extensive outreach and education and technical assistance on the statute; and engaged in ADA litigation to protect the rights of individuals with disabilities and to develop the law. By most accounts, EEOC's efforts in implementing the ADA far outstripped its previous efforts on other employment discrimination statutes. It is clear that implementing the ADA has been a major focus of the agency since the law was passed.

EEOC has been particularly effective in the ADA policy guidance it has published. Generally, these guidance documents provided thoughtful and well-researched interpretations of the statute on issues that were controversial or unsettled. In developing the guidance documents, EEOC was very faithful in interpreting the ADA consistent with congressional intent. EEOC's policy guidance has been very influential in development of the law, but on some issues, some courts have issued opinions at odds with EEOC's policy guidance. Where Federal courts have done so, they have interpreted the ADA very narrowly and restricted its coverage in ways that are at odds with congressional intent. Many Federal judges appear either to misunderstand the ADA or be hostile to it, and EEOC has been somewhat limited in its ability to influence them. However, on issues where some courts have disregarded EEOC's policy guidance, the agency has continued to make concerted efforts to develop the law consistent with congressional intent through its litigation activities. In particular, EEOC has effectively and efficiently used its authority to file *amicus curiae* briefs, to intervene in lawsuits, and to file systemic lawsuits to promote correct interpretations of the ADA, consistent with congressional intent.

In light of the resource constraints it faces, EEOC's ADA implementation, compliance, and enforcement efforts have been reasonably effective in clarifying the meaning of the ADA and developing the law, in protecting the rights of individuals charging discrimination on the basis of disability, and ensuring that persons with disabilities, employers, and the general public are informed of their rights and responsibilities under the law. Through this study, the U.S. Commission on Civil Rights has identified both areas of strength and areas that can be improved. The findings and recommendations below are intended to assist EEOC in its efforts to enhance its effectiveness in carrying out its mission to enforce the ADA.

General Findings and Recommendations

Cost of Compliance with the ADA

Finding: Many critics of the ADA argue that it imposes large costs on employers, both through the expenses associated with providing reasonable accommodations to individuals with disabilities and through the expense of defending against frivolous lawsuits. Cost of compliance is not an appropriate argument against remedying the denial of civil rights.

Recommendation: The National Institute on Disability and Rehabilitation Research might undertake a comprehensive report on the costs and the benefits of the ADA in order to provide additional information on the subject.

Media Coverage of the ADA and Disability

Finding: For the ADA to achieve its primary goal of equal opportunity for individuals with disabilities, it needs to be understood by the American public as a truly important civil rights statute that provides essential civil rights to individuals with disabilities. However, in general, the national media have provided misleading and inaccurate coverage of the ADA and related disability issues, with the result that many Americans not only do not understand the ADA, but also are hostile to it. One particularly egregious example of the poor quality of media coverage of ADA issues was the grossly inaccurate coverage of EEOC's guidance on psychiatric disabilities, which suggested that EEOC required employers to hire and retain workers who posed a safety threat to their fellow employees, where this plainly was not the case. The poor quality of coverage has led to a gross misunderstanding of the ADA on the part of the general public, as well as to increased hostility to individuals with disabilities. As one disability advocate has told the Commission, "the public relations battle is being lost" and the ADA is being viewed as a source of frivolous lawsuits and not as an important means of guaranteeing the rights of the disabled.[1]

Recommendation: Because the ADA never truly will become an effective civil rights statute if it continues to be misunderstood and viewed negatively by the American public, Federal agencies charged with enforcing the ADA, especially EEOC and the U.S. Department of Justice, along with other Federal agencies charged with protecting the interests of individuals with disabilities, particularly the National Council on Disability and the President's Committee on Employment of People with Disabilities, should work together to promote greater understanding of and support for the ADA. These agencies should mount a national public relations campaign for the ADA. Furthermore, they should make concerted efforts to ensure that journalists and other media professionals are well informed about the ADA and understand the need for accurate and balanced coverage of the statute and other disability issues.

Judicial ADA Interpretations Inconsistent with EEOC Guidance

Finding: Some Federal courts have issued decisions restricting the coverage of the ADA. These decisions often have conflicted with congressional intent as expressed in the statute's legislative history. These decisions also have generally interpreted the language of the statute more narrowly than EEOC. Many disability rights advocates have contended that these courts have gone far toward denying civil rights protections to many individuals with disabilities whom Congress, in drafting the ADA, clearly desired to protect. Unless or until the U.S. Supreme Court resolves these differences between judicial and EEOC interpretations by ruling on specific ADA-related issues, or Congress amends the statute or its regulations to clarify its intent, EEOC and some courts in the Federal judiciary, particularly Federal judges who issue decisions contrary to the ADA's legislative history, will continue to develop the law along two separate, contradictory lines. Because these differences in interpretation relate to fundamental aspects of the statute, such as whether mitigating measures should be considered in determining the presence of a disability and whether some impairments are "inherently" disabling, they have created serious concerns about the purposes of the statute and its ability to provide civil rights protections for individuals with disabilities.[2]

Recommendation: For all Federal judges to better understand and more carefully consider EEOC's legal interpretations and Congress' legislative intent in creating the ADA, the Federal Judicial Center, in partnership with EEOC, should take steps to ensure that all Federal judges are provided comprehensive training on the ADA. Specifically, EEOC should work with the Federal Judicial Center Judicial Education Division to develop curricula for training and workshops for Federal judges on ADA law. This training should be conducted by experts in the civil rights and disability advocacy field. EEOC should offer its expertise on the ADA, including attorneys from EEOC's Office of Legal Counsel, in speaking before Federal judges and in providing them with written materials to accompany training sessions. This training should address the intent and purpose of the ADA, as well as particularly complex areas of the law. To develop and coordinate this training, EEOC should enter into a partnership with the Federal Judicial Center based on a memorandum of understanding between the two agencies that would specify EEOC's role in the development of training projects relating to ADA. EEOC should ensure through this partnership that its officials have frequent opportunity to address new as well as seasoned Federal judges on ADA law.

The ADA and Disability Policy

Finding: Although the ADA often is thought of as a culmination of a long line of statutes extending civil rights protections to different groups of Americans, it also needs to be understood as a major new component of the Nation's broader policy towards people with disabilities. With the exception of section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act is the only major component of the set of programs that constitute America's disability policy that is premised on a recognition that people with disabilities have a right and, indeed, a responsibility, to work. The Americans with Disabilities Act sets a goal of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[3] Most of the rest of the Nation's disability policies are premised on what has been termed a "medical" or "charity" model of disability. Under this model, people with disabilities are injured, or limited, and deserve assistance in the form of health care, vocational rehabilitation, and, when they cannot work, income supports. Based on the medical model, over the years, the United States has put in place a variety of supports for people with disabilities, including social security disability insurance, supplemental security income, State workers' compensation programs, and disability coverage for veterans.

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[1] *See* chap. 1, pp. 6–7; chap. 5, p. 121.

[2] *See* chap. 1, pp. 7–8; chap. 4, pp. 76, 81–83, 91–99; chap. 6, pp. 125–26.

Many of these disability benefit programs have created powerful work disincentives. For instance, the loss of health care coverage from medicare or medicaid that ensues when an individual with a disability finds gainful employment is a major impediment preventing many individuals with disabilities from seeking work. As a result of these work disincentives, many individuals with disabilities are trapped in the disability benefit system. Without a major reform of the national disability benefit programs to remove their work disincentives, the ADA will never achieve its goals of "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.

In addition to the work disincentives, individuals with disabilities are often prevented from working because of lack of adequate training for available jobs, inaccessible transportation, and the need for personal assistance supports. Government provision of these needed supports could allow many individuals with disabilities to enter the work force and make substantial contributions to the economy, while saving at least some of the money taxpayers currently spend on the disability benefits system.[4]

Recommendation: Congress and the President should work together to enact legislation reforming national disability benefit programs to remove disincentives to working and provide needed supports to enable individuals with disabilities to take advantage of employment opportunities. A useful first step in this direction is for Congress to act on legislation currently pending in the U.S. House of Representatives (the Ticket to Work and Self Sufficiency Act of 1998) and the U.S. Senate (The Work Incentive Improvement Act of 1998). Congress should speedily draft a workable bill and forward it to the President for his signature. Furthermore, the National Task Force on Employment of People with Disabilities created by Executive Order on March 13, 1998, should move aggressively to fulfill its mission "to create a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population." The task force should make concrete recommendations to the President and Congress, and Congress and the President should act on those recommendations and implement other reforms as needed to ensure that individuals with disabilities are able to make the ADA's goals of "equality of opportunity, full participation, independent living, and economic self-sufficiency" reality. The task force should ensure that, as it works in this direction, it seeks and incorporates input from the disability community, employers, disability experts, and the general public, as well as Federal agencies that are not represented on the task force.

Chapter 3. Organization and Administration of the U.S. Equal Employment Opportunity Commission

EEOC's Structural Organization

Finding: EEOC's structural organization generally is conducive to effective implementation of the ADA and other employment discrimination statutes. By having a specialized unit, the ADA Policy Division in its Office of Legal Counsel devoted to ADA, EEOC has in place a mechanism for ensuring effective ADA regulatory and policy development and a nationwide outreach, education, and technical assistance program for the ADA, and that EEOC has a cadre of ADA experts who can provide training and technical assistance to its investigators and attorneys.

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[3] 42 U.S.C. § 12101 (1994).

[4] *See* chap. 2, pp. 31–37.

In addition, EEOC's division of legal responsibilities into two office, the Office of General Counsel, for litigation, and the Office of Legal Counsel, for policy development and representing EEOC, is a sound division of labor that prevents conflicts of interest within a given legal office. Where necessary for consistency in EEOC's policy positions and other matters, staff from the two offices appear to interact and communicate effectively with each other.[5]

Recommendation: The Commission commends EEOC's designation of a particular office to conduct litigation and another to concentrate on policy development. The Commission recommends that EEOC's structural organization be used as a model for other Federal agencies, particularly civil rights enforcement agencies.

Systemic Enforcement Plan

Finding: In their joint report published in March 1998, the Priority Charge Handling Task Force and the Litigation Task Force recommended that the Systemic Enforcement Services unit develop a Systemic Enforcement Plan. Such a plan would explain how the unit plans to supplement the systemic work done by the field offices. According to the report, the plan should set expected results, and the unit should be responsible for achieving these results.[6]

Recommendation: EEOC should implement the recommendation of the joint report for a Systemic Enforcement Plan as soon as possible. Such a plan could set priorities for the Systemic Enforcement Services unit and provide for specifically targeted issue areas. The plan should have built-in flexibility to ensure that when new issues emerge they can become a plan priority.

Commissioner Task Forces

Finding: Under the leadership of former Chairman Gilbert Casellas, EEOC has instituted the constructive practice of having Commissioner-led task forces evaluate strategies, polices, procedures, and practices and develop recommendations for improving the agency's operations. These task forces have produced thoughtful reports that were acted upon and resulted in substantial improvements in the way EEOC conducts its business. However, to date, the task forces have not focused sufficiently on EEOC's enforcement of the ADA. For instance, the recent task force report on "Best" Equal Employment Opportunity Policies, Programs, and Practices provides very little information on employment practices that promote the purposes of the ADA.[7]

Recommendation: The Commission commends EEOC for its use of Commissioner-led task forces to evaluate its operations and make recommendations for improvement. However, EEOC should create a Commissioner-led task force to evaluate its enforcement of the ADA. This task force should also work to provide information to employers on "best" ADA practices, or practices that advance the purpose of the ADA. In particular, the task force should emphasize that employers need to take a proactive approach to compliance with the ADA and not merely respond on an *ad hoc* basis to the needs of individual employees with disabilities. The task force should emphasize that compliance with the ADA is an interactive process, and employers are responsible for anticipating and responding to the needs of employees with disabilities and developing a workplace that provides true equal employment opportunity for individuals with disabilities.

Local Enforcement Plans

Finding: EEOC's National Enforcement Plan requires each district office to produce a local enforcement plan (LEP) that identifies underserved populations, geographic areas, and employment practices important to their districts; identifies and prioritizes local issues under the National Enforcement Plan, and describes how the office intends to manage its charge inventory. The first generation of LEPs, developed and implemented in 1996-1997, clearly have failed to achieve their intended purpose of being valuable strategic, policy, and management tools for EEOC. The district offices were not given much guidance on how to develop their LEPs, and as a result, there is little uniformity in what was produced. Furthermore, in general, the district offices' efforts to seek and incorporate local stakeholders' input as they developed their plans were inadequate. Although some district offices made a serious effort to include stakeholders, others relied primarily on staff input. Finally, the LEPs generally did not include clearly articulated and achievable goals and objectives and thus cannot be used effectively as management tools. The 1998 joint report of EEOC's Priority Charge Handling Task Force and its Litigation Task Force recognizes the shortcomings of the first generation of LEPs and made a number of important recommendations for making the LEPs more effective strategic, policy, and management tools.[8]

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[5] *See generally* chap. 3, pp. 38–51.

[6] *See* chap. 3, p. 43.

[7] *See* chap. 3, pp. 51–53.

Recommendation: EEOC should adopt and implement the recommendations of the joint report of the Priority Charge Handling Task Force and the Litigation Task Force with respect to the local enforcement plans to ensure that the plans become the truly valuable strategic, policy, and management tools they are intended to be, rather than mere pieces of paper thrown together to meet a requirement. In particular, the Office of Field Programs and the Office of General Counsel should work together to provide detailed guidance on what is expected in a LEP, including providing a uniform format. The LEPs should be designed to include clearly articulated and measurable goals and objectives, so that they can represent a type of "contract" between the district offices and EEOC headquarters. Measurable goals and objectives also will permit EEOC headquarters and district offices to be evaluated on their success in achieving the goals and objectives. Finally, the district offices should make an enhanced and substantial effort to consult with stakeholders in the development of their plans, and the LEPs should clearly reflect that input. District offices should use the LEPs as a way to develop an ongoing partnership with stakeholders to ensure that EEOC is responsive to local needs and priorities.

Finding: EEOC's National Enforcement Plan encourages "joint investigative and enforcement activities" between field offices and the fair employment practices agencies (FEPAs). It also encourages district offices to solicit suggestions from the FEPAs in developing their Local Enforcement Plans. Currently, there is little coordination between FEPAs and EEOC field offices on investigations. Furthermore, although FEPA directors attend an annual meeting, usually at EEOC headquarters, which provides training on different areas, the joint report of the Priority Charge Handling Task Force and the Litigation Task Force stated that this training was not sufficient to meet the needs of all FEPA staff.[9]

Recommendation: In keeping with recommendations made in EEOC's National Enforcement Plan, EEOC should develop more coordination between FEPAs and EEOC's field offices with respect to investigations. Also, EEOC should ensure that training is sufficient to meet the needs of *all* FEPA staff, not just FEPA directors.

Strategic Plan

Finding: EEOC's 1997-2002 Strategic Plan, developed in accordance with the mandate of the Government Performance and Resolution Act, does not adequately fulfill the requirements of the act. Although it effectively recounts EEOC's recent initiatives and accomplishments and identifies barriers to the agency's effectiveness, especially the continuing lack of sufficient resources, the plan does not establish clear performance objectives and measures and provides little detail as to how EEOC intends to accomplish its goals and objectives. The plan points to the difficulty in measuring the extent of equal employment opportunity, but does not make a serious attempt to grapple with the problem of how to establish meaningful and measurable goals and objectives.[10]

Recommendation: EEOC should enhance its Strategic Plan by developing a companion document with clear performance objectives and measures. In doing so, EEOC should use the best measures available for determining outcomes. Such a document could be the foundation for the annual performance plans that also are required by the Government Performance and Results Act.

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[8] *See* chap. 3, pp. 53–56.

[9] *See* chap 3, pp. 52–53.

[10] *See* chap. 3, pp. 56–59.

Budgetary and Staff Resources

Finding: EEOC clearly is an agency that is straining to accomplish its mandate in the face of insufficient budgetary and staff resources. Despite several creative efforts to make the most of its available resources, EEOC cannot truly accomplish its mission of promoting equal employment opportunity without an increased budget appropriation from Congress. However, the agency has not conducted any formal internal studies, nor has it contracted with an outside entity, to assess or prioritize its budgetary and staffing needs in light of its workload and its Strategic Plan and National Enforcement Plan. Without such a study, EEOC cannot make a convincing case for why it should be given more resources and explain clearly what it would do with additional funds if it receives them. At the President's request, Congress is considering increasing EEOC's budget appropriation substantially. At the same time, Congress is deciding where any additional funding should go. Without a serious budgetary study by EEOC, Congress likely will make these appropriation decisions based on political factors and insufficient information.[11]

Recommendation: EEOC should do a formal study of its budgetary and staffing needs in light of its workload. Strategic Plan, and National Enforcement Plan and develop a detailed plan for what it would do with additional budgetary and staffing resources. The plan should include accountability factors to ensure that any additional resources are used appropriately, effectively, and efficiently. Congress should consider such a study and plan seriously and provide increased appropriations to EEOC to permit the agency to fulfill its statutory mandate.

Staff Training on ADA

Finding: EEOC provided comprehensive initial training on the ADA to all of its staff, and both EEOC headquarters and field offices have pursued an active staff training agenda on the ADA since the initial training. Some in the disability advocacy community have voiced concerns that EEOC field office staff do not have sufficient training on the ADA to handle ADA charges appropriately, but most EEOC staff interviewed by the Commission appear to be satisfied that they have received adequate training on the ADA. EEOC's ADA training manual is excellent and comprehensive. Given its limited resources, EEOC's level of commitment to providing ADA training to its staff has been exceptional, and the training appears to have been superior to that provided on other employment discrimination statutes EEOC enforces. Nevertheless, because ADA law continues to develop, ongoing staff training on the ADA is needed. EEOC has no budget for staff training. A recent EEOC initiative to develop training partnerships with the American Bar Association to provide free training to field office staff on specific issues shows promise as a way of ensuring that staff are provided necessary training on the ADA and other employment discrimination laws and issues.[12]

Recommendation: The Commission commends EEOC for the quality training it has provided its staff on the ADA and, in particular, the excellent ADA training manual it has developed. EEOC should continue to provide ongoing training to staff on the ADA, as well as on other employment discrimination statutes and issues. EEOC should make maximum possible use of its training partnership with the American Bar Association to ensure that staff are trained on emerging ADA issues. However, such training cannot take the place of systematic training, which can only be accomplished if EEOC obtains congressional funding for staff training. In its budget requests to the Office of Management and Budget and in testimony before Congress, EEOC should identify the ongoing need for staff training on the ADA and other employment discrimination laws and issues, including civil rights investigations. Congress should provide specific funds targeted to training EEOC's staff.

Finding: Although EEOC investigators have received considerable training on the ADA, the law is complex and may present them with particular challenges when handling charges of discrimination based on disability. Furthermore, because it is new, the ADA is a developing law, and issues can arise in a particular ADA case that were not covered in the ADA training.[13]

Recommendation: EEOC should contract with an independent outside auditor to review the case files for all ADA investigations to evaluate their quality and ensure that investigators used the proper analyses in their investigation. Where problems are uncovered based on the case file reviews, EEOC should develop and provide targeted training to ensure that all of its investigators have the knowledge to do quality ADA investigations. If the reviews uncover evidence that some investigations have been done improperly or have not been sufficiently thorough, these cases should be reopened and reinvestigated.

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[11] *See* chap. 3, pp. 59–62.

[12] *See* chap. 3, pp. 62–65.

[13] *See* chap. 3, pp. 62–63.

Chapter 4. Assessment of EEOC's Rulemaking and Policy Development

EEOC's Title I Rulemaking and Policy Development

Finding: EEOC has actively pursued ADA rulemaking and policy development. EEOC released a comprehensive title I regulation a year after the law was enacted and since then has issued a series of policy guidance documents on ADA issues. The creation of an ADA Policy Division in the Office of Legal Counsel has brought together in one office the legal expertise on the ADA necessary to develop sound policy. In addition, EEOC has developed and furthered its policy positions through the litigation activities carried out by the Office of Legal Counsel. The interactions and communication between staff in the Offices of Legal Counsel and of General Counsel on ADA issues are positive and have permitted EEOC to develop and pursue a unified and sound ADA policy agenda. Furthermore, the recent creation of a policy development committee should enhance EEOC's effectiveness in developing and publishing sound ADA policy.

However, EEOC does not adequately include views of stakeholders in the policy development process. Some disability advocates have criticized EEOC for not having a formal mechanism in place for advocacy groups to raise issues or concerns with EEOC on specific issues *before* issuance of EEOC policy guidance. Although EEOC follows the formal notice and comment procedures for issuing substantive regulations, it has no similar mechanism in place for interpretive policy guidance. EEOC has frequent informal interactions with stakeholders, but no formal mechanism for obtaining stakeholders' participation as it develops particular ADA policies. EEOC "floats" ideas at meetings and welcomes letters on policy issues from stakeholders, but it does not solicit comments on or circulate drafts of proposed policies outside of the agency before they are approved by the Commissioners. As a result, stakeholders have felt left out of EEOC's ADA policy development process. Both EEOC and its stakeholders could benefit from more formal interaction during the policy development process.[14]

Recommendation: The Commission commends EEOC for the creation of an ADA Policy Division and the sound ADA policy it has developed. However, EEOC should take steps to increase stakeholders' participation in its policy development process. It would be impractical for EEOC to provide for formal review and comment of its proposed policies and that would likely slow the policy development process. However, EEOC should develop a formal mechanism for obtaining stakeholders' views during its policy development process. An example of such a mechanism might be a notice in the *Federal Register* that EEOC has begun working on a draft of an enforcement guidance on a specific topic and invites comments, or that EEOC has finished a draft of an enforcement guidance document that is available for review and comment pending completion of a final version. More generally, EEOC should create an ADA Policy Advisory Committee consisting of representatives of disability advocacy groups, disability experts, and employers to advise the Commission on where further ADA policy guidance is needed and provide input on what it should say. Members of the advisory committee should be chosen to represent the wide array of stakeholders' interests, including people from all regions of the country and individuals with different kinds of disabilities. This committee should meet regularly, at least twice a year, with the newly formed staff policy development committee.

EEOC's Policy and Enforcement Guidance on Title I of the ADA

Finding: EEOC's guidance on the ADA to date, both in regulations and policy, has been exemplary both in implementing Congress' intent to ensure civil rights for people with disabilities and in elucidating and clarifying the statute's more ambiguous language, based on congressional intent as stated in the ADA's legislative history.[15] EEOC has published important ADA policy guidance documents in a number of areas that inform the public of its position. In addition, the legal interpretations that EEOC advances in its ADA policy guidance play an important role in shaping nearly every aspect of the agency's ADA implementation and enforcement efforts.[16]

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[14] *See* chap. 4, pp. 66–77.

However, EEOC has not delivered on its promise, in an early policy guidance on the major provisions of the ADA, that it would develop several policy documents on "Theories of Discrimination" under the ADA, "Definition of Qualified Individual with a Disability," and "Reasonable Accommodation and Undue Hardship." These issues, particularly reasonable accommodation and undue hardship, lie at the center of some of the most heavily disputed debates that have arisen since the passage of the ADA. The issues are of extreme importance for employers and people with disabilities alike, in terms of understanding their rights and responsibilities under title I. EEOC policy guidance on these topics would help to clarify the agency's position, develop the law, and improve employers' and employees' understanding.[17]

Recommendation: EEOC should proceed expeditiously to develop and publish policy/enforcement guidance on the definition of qualified individual, reasonable accommodation, and undue hardship within 6 months from publication of this report. In addition, EEOC should continue to develop, publish, and disseminate policy guidance on other key issues that it has not already addressed. For instance, EEOC should also issue guidance on health insurance and disability-based insurance in one comprehensive policy document.

Finding: EEOC typically does not issue enforcement guidance on every unresolved ADA issue causing conflict among the courts, reserving its enforcement guidance for larger topics of importance. One reason for this is that EEOC's Office of General Counsel, in litigation and *amicus* activity, advances EEOC's position on these issues. However, in the past, the Office of Legal Counsel issued brief, 1-page documents on discrete topics relating to the ADA. For example, on May 11, 1995, EEOC issued a 1-page "guidance memorandum" on disability plans under the ADA. On July 17, 1995 EEOC issued a "policy statement" on alternative dispute resolution. These brief documents address specific ADA-related topics without the indepth analysis of the much longer ADA enforcement guidance documents. The short documents, nonetheless, offer an effective mechanism for enunciating or clarifying EEOC's position on specific topics or issues, particularly issues in which the courts are in conflict.[18]

Recommendation: EEOC should reinstitute the practice of issuing brief "policy statements" to offer an official position on ADA issues on which it chooses not to do enforcement guidance. Such policy documents could serve to state, reinforce, or elaborate on specific issues, particularly those on which the courts are in conflict. In addition, these statements could be used to help disseminate EEOC's positions to employers.

Finding: In many of its activities, EEOC addresses issues and topics that may require the advice of subject-matter experts in social science or medicine. For instance, in EEOC's enforcement guidance on the ADA and psychiatric disabilities, EEOC attorneys not only drafted a legal discussion and analysis, but also addressed clinical issues, such as separating mere traits from a diagnosis of a personality disorder and determining when traits, such as poor ability to concentrate or think, become signs of an impairment. Furthermore, EEOC investigators and attorneys investigating charges of discrimination or pursuing litigation often need to understand a charging party's medical condition to determine whether he or she has a disability under the ADA. Thus, EEOC staff in the ADA Policy Division and in the field offices could benefit from consultation with inhouse experts. EEOC has inhouse experts, including social scientists, economists, psychologists, and other subject matter experts, in its Research and Analytic Services unit in the Office of General Counsel.

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[15] *See* chap. 4, pp. 72–76.

[16] *See* chap. 4, pp. 72–73.

[17] *See* chap. 4, pp. 75–76.

[18] *See* chap. 4, p. 75.

However, the Office of Legal Counsel and its ADA Policy Division apparently have had little contact with that office. Furthermore, despite evident need, EEOC does not have inhouse medical experts in the Research and Analytic Services unit or any other unit.[19]

Recommendation: EEOC should enhance its use of subject-matter experts in ADA policy development and case handling. Office of Legal Counsel staff should use more fully the Research and Analytic Services expertise in subject matter fields, particularly during the development of policy guidance. At a minimum, if staff in the Research and Analytic Services have expertise in an area in which the ADA Policy Division is preparing guidance, then the Office of Legal Counsel should have such staff review the document for accuracy. Furthermore, EEOC should consider whether hiring an inhouse medical expert would be beneficial to its staff doing ADA investigations and litigation.

Defenses

Finding: Although an understanding of the concepts of "job related" and "business necessity" is crucial to any case in which the employer is relying on qualification standards as a defense, EEOC's treatment of these concepts has been limited to providing definitions of the terms in its title I regulations and the appendix to its regulations. These definitions are not always clear. For example, EEOC's regulations and their appendix do not provide a simple, direct discussion of the meaning of business necessity. The interpretive guidance/appendix states that "[s]election criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity." This explains, in a somewhat convoluted way, what business necessity is not but not what it is. A definition of both business necessity and job relatedness, framed in simpler, more direct, language can be found in the ADA legislative history. The House Committee on Education and Labor report states:

> The interrelationship of these requirements in the selection procedure is as follows: If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job. If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation. However, the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion.[20]

Recommendation: EEOC should include a discussion and analysis of the meaning of "job related" and "business necessity" in its future policy guidance on "qualified individual with a disability" and reasonable accommodation. This discussion should build on EEOC's previous guidance in the appendix to its title I regulations, as well as the definition in the House Committee on Education and Labor report.

EEOC Policy Guidance: Defining Disability

Finding: The ADA statute provides a broad framework for ensuring equal employment opportunity and nondiscrimination for people with disabilities in employment. However, the broadness of its language has created room for controversy among policy makers and in the Federal courts as to the definition of such keys terms as "disability," and "reasonable accommodation." EEOC has sought to clarify the meaning of key terms in title I and its implementing regulations, such as "substantial limitation" and "major life activity." In keeping with congressional intent, EEOC has interpreted these terms broadly. However, some courts have disagreed with EEOC's interpretation and have applied a more narrow reading.[21]

Recommendation: EEOC should continue a dialogue with the private bar and the Federal judiciary to establish understanding of and create consensus on the meaning of key terms contained in the ADA's definition of "disability" and their proper applicability in a title I analysis. EEOC should adopt a policy of pursuing regulatory additions in areas where the courts have consistently opposed the EEOC's position on key ADA issues, such as mitigating measures, even though EEOC has the statute's legislative history behind its position.

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[19] *See* chap. 4, p. 75.

[20] H.R. REP. NO. 101–485(II), at 71 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303, 353–54. *See* chap. 4, pp. 79–80.

[21] *See* chap. 4, pp. 81–83.

Finding: Ever since the passage of the ADA, there have been fears that the statute would lead to numerous frivolous lawsuits by individuals with mild or imaginary impairments. However, the ADA is a carefully crafted document that relies on section 504 of the Rehabilitation Act for its primary substantive requirements. These requirements are rigorous and include the need to show a *substantial* limitation to a major life activity. Whether an impairment is substantial requires an evaluation of the nature, severity, and potential for permanence. Thus, it is very unlikely that a claimant with a mild or imaginary impairment will survive EEOC priority charge processing system or prevail in court. If accurate information on the ADA's requirements were readily available to potential claimants whose claims are meritless, as well as to their employers, the number of meritless lawsuits could be minimized. Similarly, if employers were well informed of their obligations under the statue, the need for individuals with meritorious cases to file suit to obtain compliance would be reduced.[22]

Recommendation: To minimize the costs associated with meritless or unnecessary ADA lawsuits, EEOC should work extensively with human resources, management officials, labor union representatives, and clinicians, to ensure that the criteria, standards, and processes for determining who is a qualified individual with a disability and what is a reasonable accommodation are disseminated widely among these professionals and others who need to understand these concepts to ensure compliance with the ADA and avoid litigation.

EEOC Policy: Substantial Limitation

Finding: The decisions of the Federal courts have helped to define the scope of the term "physical or mental impairment" with respect to the length of time needed for a limitation of a major life activity to be "substantial." In the courts, claimants bringing cases based on temporary disabilities largely have failed to achieve protection under the ADA. This is an area where the majority of courts agree with EEOC. However, it appears that some attorneys continue to bring meritless ADA cases on behalf of individuals with temporary impairments that waste time and resources of plaintiffs, defendants, and the judicial system.[23]

Recommendation:. EEOC should conduct a program with the private bar to exchange information and analysis on the ADA that would allow the agency to clarify or explain its policy positions and address other relevant issues. EEOC should undertake this effort through its current partnership with the American Bar Association to train EEOC attorneys and any other partnerships it has already or will develop with the employment law divisions of major attorneys' professional organizations such as the American Bar Association and the National Bar Association. EEOC should work with these organizations to develop training, workshops, and conferences addressing such themes as "understanding the ADA" and "avoiding frivolous litigation in civil rights cases." To minimize the litigation of meritless cases, EEOC should rely on its technical assistance staff working with its ADA Policy Division to ensure wide dissemination among plaintiffs' attorneys of as much written guidance and technical assistance material as possible focusing on ADA claims where precedent and EEOC's guidance make clear that the alleged "disability" will not meet the ADA standard.

EEOC Policy: The Major Life Activity Analysis

Finding: Much of the controversy surrounding the ADA has to do with whether particular activities can be considered "major life activities" for purposes of the statute. Although EEOC has given examples of major life activities in its regulations and policy guidance, it has never issued a comprehensive list of major life activities, nor has it attempted to define further the term's meaning, perhaps by developing specific criteria for what constitutes a major life activity.[24]

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[22] *See* chap. 4, pp. 72, 79–80, 85.

[23] *See* chap. 4, pp. 86–87.

[24] *See* chap. 4, pp. 87–89.

Recommendation: In light of continued controversy over what a major life activity is, EEOC should issue some form of guidance, perhaps a brief 1- or 2-page policy statement that would rely in part on the ADA's legislative history and the U.S. Supreme Court's decision in *Bragdon v. Abbott*. The policy statement should provide some specific criteria for determining whether a given activity constitutes a major life activity.

Finding: In general, a major problem with the regulatory requirements relating to showing a substantial limitation in the major life activity of working is that they are too vague. As a result, the EEOC's regulatory guidance on doing this analysis appears to require courts to place an extremely high burden on claimants seeking to show substantial limitation. EEOC's requirement for ADA claimants to show substantial limitation in a "class or broad range of jobs" has resulted in courts disagreeing on the proper criteria for defining a class or broad range of jobs. Using these guidelines, what one court would include as a job in which the claimant must prove that he or she would be substantially limited, another court may find irrelevant to its analysis.

For example, one court has found that a pilot must show that he is limited in *nonpilot* jobs for which his training qualifies him, as opposed to only showing that he or she has a disability that prevents, or is perceived as preventing him or her, from performing the job of a pilot. However, another court found that the relevant class of jobs was limited to pilot jobs. This court stated that the relevant class of jobs was "that of all *pilot* positions at all airlines." However, even this characterization presents a disagreement because another court has found that the relevant class of jobs was limited to pilot jobs *only at the defendant airline*. These regulations have been criticized on several other grounds.[25]

Recommendation: EEOC should issue a notice of proposed rulemaking and hold hearings on better ways to ensure that the regulations do not create discrimination through the provisions on a broad range or class of jobs. At a minimum, EEOC should issue enforcement guidance or a policy statement addressing the issue that provides analysis and offers examples to clarify this standard.

Finding: The factors for determining whether a person is substantially limited in the major life activity of working provided in the title I regulations can be criticized on two grounds. First, disabled individuals will, in some cases, have to expend resources proving that they are substantially limited by showing evidence for these criteria. Second, the factors include geographical limitations that could undercut protection from discrimination because they could mean that an individual with a disability who resides in one geographical region would have the protection of the statute while an individual in another region may not.[26]

Recommendation: EEOC should issue a notice of proposed rulemaking and hold hearings on better ways to ensure that the regulations do not create discrimination based on geographical area.

Finding: EEOC's guidance clearly indicates that in determining whether an individual has a disability under the ADA, it first must be determined whether the individual has a substantial limitation to a major life activity other than working and then, if the individual does not, whether the individual has a substantial limitation to the major life activity of working. However, there is still misunderstanding or misapplication of the distinction between "major life activity" in general and the "major life activity of working." At least one recent court decision shows faulty reasoning in finding that a plaintiff's impairment was not a disability because it did not prevent her from doing her job duties, without first considering whether the plaintiff had a substantial impairment to any other major life activity.[27]

Recommendation: EEOC should issue new policy guidance, perhaps in the form of a brief policy statement specifically addressing the analysis for the major life activity of working. This guidance should explain that a title I claimant only needs to show a substantial limitation in the major life activity of working as an alternative argument, when the claimant cannot show a substantial limitation in any other major life activity. Since this is a very important distinction that, if misapplied, could significantly change the outcome of a case, the proper analysis for distinguishing between the concepts of "major life activity" in general and "major life activity of working" should be reiterated. In addition, EEOC should continue to file *amicus* briefs in cases where this issue is likely to be present.

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[25] *See* chap. 4, pp. 89–91.

[26] *See* chap. 4, pp. 90–91.

[27] *See* chap. 4, pp. 90–91.

EEOC Policy: Mitigating Measures

Finding: EEOC has been clear in stating that mitigating measures should not be considered in determining whether an impairment or a substantial limitation exists. However, EEOC has not addressed in policy the courts' concerns that for all practical purposes the substantial limitation has been removed in a situation where the disability is controlled through a mitigating measure. EEOC has not explained clearly what the substantial limitation is for an individual whose disability is controlled through mitigating measures.

To date, EEOC's efforts in strengthening its position on mitigating measures and working to ensure that it prevails in the courts have been somewhat limited. For example, EEOC has not issued guidance on mitigating measures in the form of a substantive regulation, which would carry substantially more legal weight and would require the courts' deference; nor has EEOC addressed the issue in comprehensive policy guidance that provides a careful, thoroughly developed rationale explaining EEOC's position as it has done for other discrete topics and issues such as psychiatric disabilities and the effects of representations made in disability benefits claims on ADA claims. EEOC has addressed the mitigating measures issue in significant ways in its enforcement guidance on other title I issues and in its litigation and *amicus curiae* briefs. In addition, EEOC has continued its program to conduct technical assistance and outreach and education with members of the Federal judiciary and the private bar explaining EEOC's interpretation of mitigating measures under the first prong of the ADA's definition of disability.[28]

Recommendation: Barring a Supreme Court ruling resolving the mitigating measures issue, at a minimum, EEOC should issue new policy guidance addressing the issue of mitigating measures and explaining what exactly the substantial limitation is in situations where mitigating measures are reducing the effect of the impairment on the individual's life. In other words, EEOC should address the arguments that some courts are making that the mitigating measure removes the substantial limitation for all practical purposes.

EEOC should file more *amicus* briefs in cases in which mitigating measures have been at issue. EEOC should consider issuing any guidance on this issue in the form of a substantive regulation that would have greater legal authority, thereby making it more difficult for the courts to ignore as they have ignored EEOC interpretive and policy guidance on this issue. Finally, EEOC should hold training or conferences with members of the Federal judiciary and the private bar on this issue.

EEOC Policy: *Per Se* Disabilities

Finding: EEOC's policy guidance supports the idea that some disabilities can be considered *per se* disabilities, or inherently substantially limiting under the ADA. EEOC's guidance states "[i]n very rare instances, impairments are so severe that there is no doubt that they substantially limit major life activities. In those cases, it is undisputed that the complainant is an individual with a disability." However, EEOC's position on *per se* disabilities is not entirely clear. EEOC's Associate Legal Counsel has said that EEOC's position is that in determining whether an individual has a disability under the ADA, it always should be considered whether the individual meets the criteria laid out in the three prongs of the ADA's definition of disability. On the other hand, she said that EEOC acknowledges that there is legislative history suggesting that asymptomatic HIV is covered as inherently substantially limiting and that some courts have found that other impairments such as insulin-dependent diabetes, alcoholism, and manic depression are *per se* disabilities.

Some courts have rejected the language in EEOC's guidance stating that "[o]ther impairments, however, such as HIV infection, are inherently substantially limiting," because they have determined that it "effectively negates the statutory requirement that one must be substantially limited in order to be covered," thus creating a category of *per se* disabilities that arguably do not require the analysis indicated in the ADA's definition of disability. Thus, EEOC's guidance relating to *per se* disabilities under the first prong appears directly at odds with these recent court decisions.

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[28] *See generally* chap. 4, pp. 91–99.

To date, EEOC has issued no new policy guidance or substantive regulation addressing the apparent contradiction noted by recent court decisions relating to whether the requirement for a showing of substantial limitation can be waived for some disabilities, as EEOC has stated in its guidance. The Associate Legal Counsel indicated that she does not believe EEOC will address the issue "because there is nothing EEOC can add to the debate."

The U.S. Supreme Court decided the case of *Bragdon v. Abbott* in June 1998, addressing the question of whether asymptomatic HIV infection is a disability within the meaning of the ADA. However, the Court did not address the issue of whether HIV infection is, as EEOC states in its guidance, an *inherently* disabling condition that does not require any showing of a substantial limitation of a major life activity to be considered a disability within the meaning of the ADA.[29]

Recommendation: EEOC should issue new policy explaining the implications of the Supreme Court's ruling in *Bragdon v. Abbott* for title I claims, clarifying the analysis required and addressing any language in previous guidance that seems to contract the substantial limitation requirement. In addition, EEOC should clarify whether it considers impairments, such as alcoholism or manic depression, as *inherently* substantially limiting, as it seems to indicate in its enforcement guidance on the definition of disability, and whether there should be an express exception to the substantial limitation requirement for these impairments.

EEOC Policy: The Use of the Third Prong

Finding: A question that has arisen under the third prong of the ADA's definition of disability is whether a claimant must show that his or her perceived condition or impairment is one that substantially limits a major life activity. In the case of disabilities such as asymptomatic HIV infection, under-control diabetes, and others that have been the subject of dispute under the first prong as to whether they actually create substantial limitations on major life activities, some courts that have found no disability under the first prong have taken this finding and applied it to the third prong. This analysis assumes that if the condition is not substantially limiting on a major life activity in fact, it cannot be perceived as such. However, the ADA's legislative history makes clear that a person who is rejected from a job because of the myths, fears, and stereotypes associated with disabilities is covered under the third prong, whether or not the employer's perception was shared by others in the field and *whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.*

EEOC states in its title I regulations and enforcement guidance that a determination of whether there is a substantial limitation is relevant for all three prongs. However, this position appears to contradict the House Judiciary Committee report, which clearly states that the first prong requirement that a disability must be substantially limiting to a major life activity does not apply to the third prong. As a result, there is a certain lack of clarity in EEOC's guidance with respect to the third prong.[30]

Recommendation: EEOC should issue new policy guidance addressing both the first and the third prong with respect to the requirement of a showing of a substantial limitation of a major life activity, specifically, whether the third prong can bypass the substantial limitation requirement by focusing on *perception* of disability not *actual* disability.

EEOC Policy: Reasonable Accommodation

Finding: To date, EEOC has not issued comprehensive policy guidance on the term "reasonable accommodation." The issue of reasonable accommodation has engendered much controversy and the question of what constitutes reasonable accommodation remains unresolved. EEOC has indicated that it is developing guidance on the meaning of "qualified individual" and "reasonable accommodation."

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[29] *See generally* chap. 4, pp. 99–101

[30] *See* chap. 4, pp. 101–03.

One area of some disagreement is the question of whether and when reassignment to a vacant position can constitute reasonable accommodation. EEOC's title I regulations and interpretive guidance include reassignment to a vacant position as an example of reasonable accommodation. However, in a recent case, the Tenth Circuit held that employers are not obligated under the ADA to provide another job as a reasonable accommodation. The court reasoned that reassignment can be used as a means of accommodation only when it would be *possible* to accommodate the employee in his or her current position but doing so would cause the employer undue hardship. However, where accommodation in the current position is *impossible* because the employee cannot perform the essential functions of his or her current job even with reasonable accommodation, the employee is no longer a qualified individual with a disability within the meaning of the ADA and is therefore no longer covered under the statute.

This argument, which directly conflicts with EEOC's position on the issue, raises several questions. The first question that arises in the context of reassignment is whether, to be covered, the individual with a disability needs to be qualified for the job he or she currently holds or for the one to which he or she seeks reassignment The second question is whether the qualified individual standard demands that individuals with disabilities be able to perform the essential function of the job with or without reasonable accommodation.[31]

Recommendation: EEOC should discuss the issue of whether and when reassignment can constitute reasonable accommodation in its enforcement guidance on reasonable accommodation. The discussion should address the two questions above relating to reassignment as a reasonable accommodation. The guidance also should clarify EEOC's position on the many other issues relating to reasonable accommodation.

Business Necessity and the Direct Threat Standard

Finding: An issue that has arisen under the ADA is when an employer's policy that screens out individuals based on their disabilities is justified as a "business necessity." Some employers have argued that when such a policy is motivated by safety concerns, it constitutes a "business necessity" and therefore may be permitted under the ADA. However, EEOC and at least one court have applied a more rigorous standard, stating that a safety-based policy that has an adverse effect on individuals with disabilities only is permitted if it can be shown that the excluded individuals pose a direct threat to the health or safety of others in the workplace. EEOC's position that the more rigorous direct threat standard should apply appears to be consistent with the spirit and purpose of the ADA. However, although EEOC has expressed this position by bringing suit against an employer whose drug and alcohol policy barred all employees with current or former substance abuse problems from working in safety-sensitive jobs, the agency has not issued policy guidance or technical assistance materials explaining its position to employers.[32]

Recommendation: EEOC should include a discussion and analysis of its position on safety-based qualifications as a business necessity in its enforcement guidance on reasonable accommodation and "qualified individual with a disability." This analysis should explain fully from a practical perspective, using actual workplace situations as examples, EEOC's position that all safety-based qualifications standards must meet the "direct threat" test to be considered as a business necessity.

Undue Hardship

Finding: The courts have not always agreed with EEOC's interpretations of the undue hardship requirement. One notable example is *Lori l. Vande Zande v. State of Wisconsin*,[33] where the Seventh Circuit suggested that the term "undue hardship" should be evaluated in relation to "the benefits of the accommodation to the disabled worker as well as to the employer's resources." Thus, in effect, the Seventh Circuit disagrees with EEOC's position that for an accommodation to be reasonable it need merely be "effective." The *Vande Zande* decision suggests that an employer may apply a cost-benefit analysis to determine whether a particular accommodation is reasonable. This contradicts EEOC's position that the cost of an accommodation does not enter into the analysis of whether or not the accommodation is reasonable.

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[31] *See generally* chap. 4, pp. 108–12.

[32] *See* chap. 4, pp. 112–15.

[33] 44 F.3d 538; 1995 U.S. App. LEXIS 99; 133 A.L.R. Fed. 713; 3 Am. Disabilities Cas. (BNA) 1636 (7th Cir. 1995).

Another issue relating to reasonable accommodation that remains unresolved is whether a plaintiff who proves that he or she was perceived as having a disability, and can perform the essential functions of the job, is entitled to reasonable accommodation. EEOC has not issued any guidance on this issue. However, Congress included within the meaning of disability both actual as well as perceived disability without making any distinctions between the two in terms of the threshold showing of qualifications. It follows that if a plaintiff with an actual disability is entitled to reasonable accommodation, then one with a perceived disability may be as well."[34]

Recommendation: EEOC should clarify its position on the undue hardship issue, perhaps in its enforcement guidance on reasonable accommodation and qualified individual with a disability. Given the significant concerns of numerous stakeholders, including businesses, policy makers, and at least one court, EEOC should acknowledge the opposing perspectives on the interplay between "reasonable accommodation" and "undue hardship." EEOC should demonstrate in policy guidance that its view that the only criterion for an appropriate reasonable accommodation is that it be "effective" is fully supported in the ADA and its legislative history. EEOC should issue an interim guidance on these issues to give all stakeholders, including businesses and disability rights groups, an opportunity to comment.

In addition, in its enforcement guidance on reasonable accommodation and qualified individual with a disability, EEOC should include a discussion and analysis of its position on whether plaintiffs who show that their employer perceived them as disabled are entitled to reasonable accommodation, and that the undue hardship analysis does not permit a cost-benefit analysis.

Chapter 5. Assessment of Enforcement Guidance on Title I Topics and Issues

Enforcement Guidance on Psychiatric Disabilities

Finding: EEOC's enforcement guidance on psychiatric disabilities is unclear in its statement that the *DSM-IV* may be "relevant" to identifying mental disorders that may qualify for ADA coverage. To some, use of the term "relevant" appears to suggest that there may be other means of identifying mental disorders. However, the guidance does not specify whether other means of identifying mental disorders are acceptable or what those means may be. As the guidance is written, it appears to suggest that in some circumstances mental disorders not covered in the *DSM-IV* and thus not diagnosed in accordance with *DSM-IV* criteria might be disabilities covered under the act. Thus, the guidance is far more vague than both the statute's legislative history and accepted practices of the psychiatric community, which regards the *DSM-IV* as the *only* means of diagnosing the presence of mental disorders. Addressing concerns relating to the use of the term "relevant" with regard to the *DSM-IV*, EEOC staff have explained that this term must be understood as a legal term that is used to evaluate evidence. It is not a judgment as to the *weight* of the evidence.[35]

Recommendation: EEOC should clarify in policy guidance or in a brief policy statement whether it considers the *DSM-IV* as the only relevant diagnostic manual for identifying and diagnosing mental disorders. It may be useful for EEOC to address in policy the concerns expressed about use of the term "relevant" with regard to the *DSM-IV*. EEOC also should explain that the term must be understood as a legal term that is used to evaluate evidence and not as a judgment as to the *weight* of the evidence.

Finding: EEOC uses a standard of whether the person has different abilities from "the average person in the general population" for psychiatric disabilities. This is a comparative measurement that creates a large margin of error. How many hours the average person in the general population sleeps or how much or how clearly the average person thinks or concentrates are difficult assessments to make and are probably useless in doing an EEO investigation. In addition, this generalized standard seems oddly at variance with Congress' and EEOC's "individualized" and "case-by-case" approach in implementing the ADA. It is difficult to see the utility of this standard since its practical value seems limited. At a minimum, it seems the "general population" element might be narrowed in some way.[36]

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[34] *See* chap. 4, pp. 115–17.

[35] *See* chap. 5, pp. 119–21.

Recommendation: EEOC should seek the advice of clinicians in the psychiatric field to determine a more precise measurement for assessing whether an individual is "substantially limited in major life activities," such as sleeping, thinking, and concentrating. EEOC should issue a brief policy statement further defining the means by which the "substantial limitation" determination can be made and explaining whether the "average person" standard should be applied literally or whether it is intended as an approximation of some kind.

Finding: EEOC's enforcement guidance on psychiatric disabilities states that self-reporting and the testimony of family and friends will serve as credible evidence for the presence of a psychiatric disability under the ADA. This language appears to suggest that self-reporting by itself is enough to establish the presence of a psychiatric disability.[37]

Recommendation: EEOC should revisit its statement that self-reporting and testimony of family and friends can serve as credible evidence for the presence of a psychiatric disability under the ADA to determine whether it needs clarification or elaboration, such as clarifying that self-reporting is not sufficient when the employer requests medical documents.

Finding: EEOC's enforcement guidance on psychiatric disabilities does not answer important questions relating to reasonable accommodation. The guidance does not address the issue of documentation to show the medical need for an accommodation, specifically how much information the employer is entitled to get under the ADA, or from whose doctor the information can come, the employer's or the employee's doctor. A second issue that the guidance does not discuss is the reasonable accommodation process. For example, the guidance does not address whether, in the interactive process that courts require to reach a reasonable accommodation, the employer or the employee has to suggest a potential accommodation. Furthermore, the guidance also does not address whether, in cases where reassignment might be appropriate, it is the employer's responsibility to identify possible job vacancies. Another issue that the guidance does not discuss is whether there is a continuing requirement for reasonable accommodation if one or more accommodations are attempted and prove unsuccessful. Finally, with respect to undue hardship, the guidance does not clarify its scope. For example, if a high level employee with a psychiatric disability needs a long term leave of absence, the guidance offers no information to determine at what point his or her absence amounts to an undue hardship on the company.[38]

Recommendation: EEOC should issue guidance, perhaps in the form of a brief policy statement, addressing all of these issues in the context of psychiatric disabilities. EEOC should follow up with technical assistance efforts to ensure that employers and employees alike know their rights and responsibilities with respect to psychiatric disabilities in the workplace.

Finding: In the case of violence or threats of violence, the EEOC enforcement guidance on psychiatric disabilities notes, "nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence." Several courts have found that maintaining an acceptable standard of conduct generally is an essential function of any job. Any individual engaging in abusive, violent, or threatening behavior, regardless of whether such an individual claims a psychiatric disability, may therefore be considered no longer capable of performing an essential function of the job and thus no longer "otherwise qualified." The only caveat EEOC adds to this rule is that if the sanction is not job related and consistent with business necessity, "imposing discipline under them could violate the ADA." It would be rare, if not never, that some form of sanction for violent behavior in the workplace would be considered inconsistent with business necessity and not job related. Therefore, a policy of firing those who engage in violent behavior is not a violation of the act as long as it is implemented uniformly, against both people with disabilities and those without. However, the guidance does not make clear that, if an employee who has engaged in violent behavior related to his disability has put the employer on notice as to his disability, the employer might also have to conduct a direct threat analysis to ensure that the employee is no longer a "qualified individual with a disability."[39]

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[36] *See* chap. 5, pp. 124–27.

[37] *See* chap. 5, p. 127.

[38] *See* chap. 5, pp. 128–30.

Recommendation: EEOC should address in a policy statement or letter the issue of whether the fact pattern changes significantly where the employee has put the employer on notice about his disability rather than claiming it after a violent episode. If EEOC considers these two circumstances to be different, the agency should explain in what way and how it changes the analysis. In particular, EEOC should explain whether the employer has to do a direct threat analysis or whether the employer can rely on the precedent in the courts stating that any violent behavior makes the employer no longer qualified with a disability and therefore no longer a member of the statute's protected class.

Finding: Among the most significant barriers confronting people with psychiatric disabilities in the workplace today are attitudinal barriers created by a lack of understanding by both employers and employees. This problem has been exacerbated by negative portrayals of people with psychiatric disabilities in the news media, particularly since EEOC issued its enforcement guidance in March 1997.[40]

Recommendation: EEOC should undertake a concerted technical assistance, outreach, and education effort to combat the negative myths, fears, and stereotypes that surround psychiatric disabilities. EEOC should begin by developing an interagency task force on issues confronting people with psychiatric disabilities. EEOC should develop more technical assistance documents specifically addressing issues involving psychiatric disabilities in the workplace. Along these lines, EEOC should work with private disability rights groups, including advocacy and policy research groups to produce reports on this issue. EEOC should also develop a program of outreach and education activities such as workshops, conferences, and training with public and private employers to educate them about appropriate reasonable accommodations for people with psychiatric disabilities. For example, EEOC should encourage employers to provide flexible and part-time work schedules where possible for people with psychiatric disabilities.

EEOC Policy: Interim Enforcement Guidance on Employer-provided Health Insurance

Finding: EEOC's policy position on actuarial data and its uses has been an important subject of debate. Some commentators contend that specific aspects of the interim enforcement guidance relating to actuarial data are inconsistent with the express statutory language of the ADA. For example, a disability rights advocacy group claims that the guidance fails to define what types of information courts are to consider as "legitimate" actuarial data. The same group also points out that the guidance does not require that employers or insurers provide such actuarial data to employees who are refused insurance coverage, and calls upon EEOC to mandate that employers/insurers make such information available. Further, one author has raised concerns that the interim guidance deviates significantly from the statutory language of the ADA because of its "undue reliance" on actuarial standards to define subterfuge. According to this author, the plain language of section 501(c) and legislative history indicate that actuarial principles are only to be considered in "determining whether insured plans are consistent with state law" and "do not apply to self-insured plans subject to ERISA. . . ."[41]

Recommendation: EEOC should issue guidance addressing the actuarial data issue and should consider requiring employers or insurers to provide actuarial data to employees who are refused insurance coverage. EEOC should also address the issue of whether it has been allowing "undue reliance" on actuarial principles by applying them to self-insured plans under ERISA.

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[39] *See generally* chap. 5, pp. 130–34.

[40] *See* chap. 5, pp. 133–35.

[41] *See* chap. 5, pp. 135–36, 140–44.

Finding: In its interim guidance on disability-based distinctions in employer-provided health insurance, EEOC stated clearly that it does not consider distinctions between mental health and physical health benefits to be disability-based distinctions. However, EEOC does consider this precise distinction to be a disability-based distinction in the context of long term or disability insurance. In its litigation and *amicus* briefs, EEOC has sought to prohibit the practice of providing a shorter term of coverage for mental disability than for physical disability in *disability* insurance benefit plans, but it has not taken the same position on *health* insurance plans for people who are still working. Thus, EEOC clearly makes a distinction between health insurance and long term disability insurance. However, EEOC never has clarified this distinction in policy guidance or litigation. As a result, it remains unclear why EEOC has taken arguably contradictory policy positions in its interim enforcement guidance as compared to its recent litigation posture in insurance cases.

EEOC's distinction between mental and physical for health insurance but not for disability insurance abrogates the important purpose of the ADA to prevent any kind of different treatment on the basis of a disability. Under EEOC's current position, all people with mental disabilities can legally have fewer health insurance benefits than people who have physical illnesses. In addition, this distinction is creating confusion considering that at least one court has cited to EEOC's interim health insurance guidance as support for a finding that a *disability* insurance plan distinguishing between physical and mental health benefits is not prohibited under the ADA. This apparent confusion as to EEOC's position further suggests the need for updated guidance in this area from EEOC. Finally, EEOC never issued final guidance on employer-provided health insurance. It withdrew proposed plans to issue such guidance in August 1997.[42]

Recommendation: EEOC should issue final guidance on employer-provided health insurance. When EEOC issues new policy guidance announcing its position on both parity of benefits between mental and physical for both health and long term disability insurance plans, EEOC should eliminate the distinction between health insurance and long term disability insurance and reverse its position so that both kinds of insurance require insurers to provide parity between mental and physical.

If EEOC chooses not to reverse its position, at a minimum, it should explain in policy guidance the basis for its differing positions on whether the physical-mental distinction is "disability-based" as between health insurance and disability insurance. In addition, EEOC should finalize its "interim" guidance to address not only health, but disability insurance plans.

Finding: One issue not directly addressed by EEOC in policy or by the ADA's legislative history is whether retired employees may sue under the ADA although technically they are no longer "qualified individuals with disabilities." The Second Circuit has recently reversed a lower court's ruling that retired employees can no longer perform the essential functions of the jobs they once held and therefore are not qualified individuals with disabilities. EEOC filed an *amicus* brief in this case in which it agreed with the appeals court's decision that retired employees may be eligible to sue under the ADA even if they are no longer capable of performing the essential functions of their former jobs. In this brief EEOC argued:

> The language of the ADA shows that Congress clearly intended to prohibit employers from discriminating in the area of fringe benefits, many of which are distributed in the post-employment period. If former employees may not challenge discrimination in post-employment fringe benefits, the entitlement to which they earned by virtue of employment, Congress' goal of providing comprehensive protection from disability discrimination would be severely undermined.[43]

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[42] *See* chap. 5, pp. 144–47, 148.

[43] Amicus Curiae Brief for the EEOC at 5, Castellano v. City of New York, No. 96–7920, 1998 U.S. App. LEXIS 3646, 21 E.B.C. 2697 (2nd Cir. Feb. 24, 1998).

However, EEOC has not addressed this issue in its policy or enforcement guidance.[44]

Recommendation: In its enforcement guidance on reasonable accommodation and qualified individual with a disability, EEOC should include a discussion and analysis of its position on whether retired employees who can no longer perform the essential functions of their former jobs are ineligible to sue under the ADA because technically they are not qualified.

EEOC Policy: Enforcement Guidance on Preemployment Inquiries and Medical Exams

Finding: EEOC's enforcement guidance on preemployment inquiries and medical exams appears mired in a set of complex prohibitions and requirements under which employers must labor to remain within the boundaries of permissible, nondiscriminatory conduct while doing pre-offer hiring practices such as interviews. The guidance seems entirely focused on details without ever clearly setting forth the broad principles on which the numerous requirements are based. Although the guidance attempts to clarify EEOC's position with respect to mention of need for reasonable accommodation during the interview process, it nonetheless suggests a fairly complicated and highly specific set of "do's" and "don'ts" of which employers must be aware. For example, according to the guidance, an employer may ask an applicant if he or she can perform job functions "with or without reasonable accommodation"; however, "an employer may not ask a question in a manner that requires an individual to disclose the need for reasonable accommodation." This seems a subtle and easily overlooked distinction.

Any employer who has not read EEOC's guidance thoroughly is in danger of running afoul of the statute. More than any other ADA-related issue, this one seems to require the strongest efforts on the part of EEOC to ensure dissemination to all job applicants, employers, and businesses. These efforts will require a significant amount of technical assistance, outreach, and education to ensure that all of these stakeholders have a good understanding of how to proceed through the stages of the hiring process.[45]

Recommendation: Due to the subtlety and complexity of the preemployment inquiry requirements, EEOC should devote particular attention to this area of ADA law, with increased efforts in technical assistance, outreach, and education.

Enforcement Guidance on Effects of Representations Made in Applications for Disability Benefits

Finding: As a response to a growing trend in the courts barring ADA claims by plaintiffs who had previously applied for disability benefits such as social security or workers' compensation, EEOC issued enforcement guidance in February 1997. In this guidance, EEOC advances legal and public policy arguments to support its position that the application of judicial estoppel in this context wrongly interprets the ADA and thwarts its purposes. In making these arguments, the guidance relies on a comparison demonstrating the differences between the purposes and standards of the ADA and those of the various disability benefit schemes. EEOC supports its arguments with a thorough, carefully crafted analysis that incorporates the relevant caselaw and makes excellent use of hypothetical examples. Overall, the document's analysis of the judicial estoppel issue demonstrates both common sense logic and consistency with the purposes of the ADA as set forth in the law and its legislative history.

However, this is one of only a few examples of enforcement guidance EEOC has issued on discrete smaller issues that have been the source of controversy between EEOC and the Federal courts.[46]

Recommendation: EEOC should continue to issue guidance on discrete policy issues, such as this one, that have been the source of controversy between EEOC and the Federal courts. EEOC could better and more thoroughly explain and support its position on such issues as mitigating measures, the use of the third prong, and the "major life activity of working" concept.

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[44] *See* chap. 5, p. 148.

[45] *See generally* chap. 5, pp. 148–57.

[46] *See generally* chap. 5, pp. 162–72.

Chapter 6. Assessment of EEOC's Charge Processing and Title I Enforcement Activities

Finding: The ADA is a complex statute for which legal interpretation and caselaw are still in their initial phases of development, suggesting a need for EEOC investigative and legal staff handling ADA charges to have a specialized knowledge of the ADA. Several EEOC staff noted that the complexity of the statute affects charge processing. This is due to the vagueness and complexity of ADA concepts, such as "qualified individual with a disability." One district director stated that the qualitative differences between the ADA and other statutes that EEOC enforces have presented difficulties. Because of the complexities of the law and its relative newness, EEOC has yet to take on some of the more serious issues, as it has with other laws. In addition, EEOC may have underestimated the difficulties staff have had with the law.

Although EEOC has specialized staff on the ADA in its headquarters Office of Legal Counsel, EEOC's field offices do not have investigative or legal staff who specialize on ADA charges or litigation. Investigators and attorneys work on all statutes. EEOC staff and officials have given several arguments for not having investigative or legal staff assigned to work exclusively on ADA. For instance, in field offices where there are only one or two attorneys, to assign one of them exclusively to the ADA might not make sense in comparison to the workload the office has. In addition, having all staff be familiar with all the statutes EEOC enforces may serve to give them deeper understanding of employment discrimination on which they can draw in ADA investigations and litigation. Although these arguments are persuasive, they do not prevent EEOC from designating investigative and legal staff in field offices to become "ADA experts" to whom other field office staff can turn informally for advice and assistance should a particularly complex or novel ADA case present itself.[47]

Recommendation: The Commission commends EEOC for its implementation of the law thus far. Staff have been sufficiently trained in the basics of the law. Because of the complexities of the law, however, EEOC should ensure that its staff are prepared to handle difficult issues related to applicability and enforcement of the law. Unless EEOC receives considerably more resources and increases the number of investigators and attorneys in its field offices substantially, the agency should not assign investigators and attorneys to work exclusively on the ADA. However, each field office should designate investigative and legal staff to become ADA experts who can serve as resources for other field office staff and handle particularly complex or novel ADA charges that arise. Although these individuals should not work exclusively on the ADA, they should be provided advanced training on the ADA, they should interact regularly with staff in the ADA Policy Division, and they should be given particularly complex or ADA charges to handle. Furthermore, they should provide outreach and education and technical assistance on the ADA.

Enforcement Generally

Finding: EEOC staff generally agree that EEOC has done a good job, overall, of enforcing the ADA. In addition, they appear satisfied the EEOC's Priority Charge Handling Procedures have empowered staff, giving investigators more autonomy in charge processing, increasing the interaction between investigators and attorneys, and eliminating layers of review. They appear confident that the Priority Charge Handling Procedures' categorization system is beneficial and allows them to process charges more efficiently.

However, there is a danger that meritorious charges may end up being dismissed because they are not recognized as meritorious during the intake process and therefore are categorized as "C" charges. Because of the complex nature of the ADA, this danger is particularly acute for ADA charges. Although some investigators indicated that they rarely categorized ADA charges as "C" charges during intake, the field offices generally do not appear to have in place adequate safeguards to ensure that meritorious cases are not miscategorized as "C" charges.[48]

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[47] *See* chap. 6, pp. 187–88; see *generally*, chap. 6.

[48] *See* chap. 6, p. 1888.

Recommendation: EEOC's Office of Field Programs should ensure that EEOC's field offices are implementing the Priority Charge Handling Procedures properly. The Office of Field Programs should review the procedures used in each field office to ensure that meritorious ADA charges, as well as meritorious charges under the other statutes EEOC enforces, are investigated and resolved. The effectiveness of such procedures should enter into district directors' performance evaluations.

Charge Intake

Finding: Because the intake process determines whether EEOC will accept a charge of discrimination and hence whether an individual who has experienced discrimination on the basis of disability has any chance of redress, it is essential that the intake process be thorough and effective. In general, EEOC's intake process appears to be sound. During intake, EEOC staff inform the complainant of his or her rights under the law and obtain sufficient information from the complainant to develop a charge of discrimination. All charging parties are informed of their right to file a charge, that they must file a charge to be able to file a private suit and that there is a responsibility of retaliation by the respondent. Charging parties also are informed of what to expect during the processing of their charge and are given the staff member's assessment of the charge. However, some disability advocates contend that EEOC's intake personnel are not sufficiently trained on the ADA or do not take sufficient time to interview potential charging parties.[49]

Recommendation: EEOC's Office of Field Programs, in conjunction with representatives from the field offices, should develop common procedures for intake and periodically evaluate the quality of the intake process in each field office. In addition, EEOC should develop a thorough training module for intake personnel and ensure that all personnel who perform intake duties are provided such training.

Finding: Charge intake is handled differently in the various EEOC field offices. Many offices have a rotation system in which investigative units take turns performing intake duties. Other offices have permanent intake staff. The task forces on priority charge handling procedures and litigation recommended in their joint report that the Office of Field Programs assess the results of these two methods and share the information from the assessment with the field offices.[50]

Recommendation: The Office of Field Programs should review each field office to evaluate the effectiveness of its form of charge intake and recommend changes where needed. Based on the results of the review, EEOC should develop a model charge intake system that can be implemented where district office officials feel there is a need for change.

Finding: The different field offices have different ways of providing information to potential charging parties. For example, the Chicago and Los Angeles district offices show potential charging parties a videotape while they wait for their interview. The joint task force report recommended that the Office of Field Programs coordinate the information provided to charging parties. All videos, foreign language materials, and brochures should be made available to all offices. The report further recommended that the Office of Field Programs, the Office of General Counsel, and the Office of Communications and Legislative Affairs assess information needs and determine what should be developed centrally for distribution to field offices.[51]

Recommendation: All field offices should have the same resource materials available for their use. When a field office develops resource materials for its own use, it should forward the materials to the Office of Field Programs for dissemination to the other field offices. Charging parties across the country should be provided the same information.

Finding: Staff interviewed by the Commission stated that intake of ADA charges does not differ greatly from intake of charges filed under other statutes; however, there are some differences. An enforcement supervisor in Dallas said that if a person has a disability that is not apparent, staff give that person the "ADA letter," which tells the charging party that EEOC must receive written medical information from a physician that explains what the disability is and how it rises to the level of a disability that substantially limits a major life activity. The charging party is given 30 days to provide this information. Such cases usually are categorized as "B" charges, pending the receipt of medical information. It is the responsibility of the charging party to provide that information. EEOC will dismiss the case if the information is not received.[52]

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[49] *See* chap. 6, pp. 191–92.

[50] *See* chap. 6, pp. 192–93.

[51] *See* chap. 6, pp. 191–93.

Recommendation: EEOC should ensure that ADA cases, as well as other cases, are being handled in the same manner by all field office staff. Procedures should be developed for obtaining medical information from charging parties. EEOC should have inhouse contractors with the expertise needed to assess medical information. For example, EEOC should contract with NIH, an agency known for its medical expertise, for medical advice.

Charge Categorization

Finding: During the intake interview, EEOC staff decide if a charge falls under category "A," "B," or "C." Many staff indicated that under the new procedures there is better screening of charges, and staff can be honest with charging parties about the prospects and validity of their case. However, one district director reported that he is not comfortable stating that staff are capable of making a determination of the priority of a charge. Thus, supervisors also are involved in charge categorization. For all four statutes enforced by EEOC, close to 60 percent of the charges are placed in category "B." Category "A" charges account for 15 percent of all ADA charges, while category "C" charges account for 27 percent of all ADA charges.[53]

Recommendation: Although intake staff should make an initial determination of which category a charge should be in, the categorization of charges should be reviewed by supervisors after the interview to ensure that the correct category has been assigned. The Office of Field Programs should conduct a review based on a comparative sample of offices to assess how well offices are doing with the categorization procedures currently in place. Additional training should be provided to those offices where OFP determines there is a problem with correct charge categorization.

Finding: Charge categorization is not handled uniformly across field offices. Many field offices further categorize "A," "B," and "C" charges. For example, the Charlotte District Office has two categories for each priority level. In Dallas, for "C" charges that are dismissed during intake, the charging party is given a right to sue letter during the interview. Furthermore, the joint task force report noted some problems with charge categorization. For example, the Charge Data System data indicate that not all "C" charges are dismissed at intake. The report stated that sometimes investigators feel they need additional information before they can categorize charges as "C" charges. The task forces also noted an imbalance in the identification and processing.[54]

Recommendation: EEOC should ensure that all offices are using the same system for categorizing charges. Although EEOC has a document that briefly explains the "A, B, C" categories, it should provide further assistance to field office staff. Along these lines, EEOC should develop and issue a comprehensive staff reference guide providing specific examples and other useful information for field office use.

Finding: Charge categorization may be misunderstood by respondents, charging parties, and other individuals outside of EEOC. For example, the director of Golden State University's Employment Rights Clinic stated that practitioners do not understand clearly the prioritization system and do not know if they can influence the decision process. The director also stated that charging parties may not know how to frame their charge so that the important legal facts are made clear. Similarly, intake personnel may not be able to determine if there are bases for discrimination other than as described by the charging party.[55]

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[52] *See* chap. 6, p. 193.

[53] *See* chap. 6, pp. 193–95.

[54] *See* chap. 6, p. 195.

[55] *See* chap. 6, p. 195.

Recommendation: EEOC should develop materials to explain the Priority Charge Handling Procedures to groups outside of EEOC, particularly charging parties. These materials should include user-friendly outreach and education documents that would clearly explain EEOC procedures for charge intake and categorization. In addition, these documents should thoroughly explain the types of information EEOC relies on in reviewing and categorizing charges. Also, these documents should contain complete information that tells people planning on filing a charge with EEOC what they can expect from the moment they walk in the door until they have a determination on their case. These materials should be disseminated widely among the public to ensure that as many people as possible have access to specific information on how to file an ADA complaint and how EEOC addresses complaints once they have been filed.

Commissioner Charges

Finding: Commissioner charges are an important tool for eliminating discrimination in those cases where the victims cannot or do not file individual charges. Commissioner charges are used as an enforcement tool in cases where there is no individual charge, often when victims of discrimination may be afraid to file a charge with EEOC, or even may not realize that they are being treated unfairly because they have no basis of comparison. EEOC staff or outside individuals or organizations may request a Commissioner charge. EEOC Commissioners told the Commission that they take the Commissioner charges very seriously and only file them when they are convinced that discrimination has occurred. Commissioner charges account for only a small proportion of all EEOC charges. Only 99 ADA charges have been Commissioner charges. Of all charges filed between October 1989 and September 1997, 559 were Commissioner charges, representing less than 1 percent of all charges.[56]

Recommendation:. EEOC should continue the judicious use of Commissioner charges to advance the purposes of the ADA and the other statutes that EEOC enforces when there is sufficient evidence to suggest that discrimination has occurred. EEOC should use Commissioner charges the greatest extent possible in conjunction with the National Enforcement Plan to ensure that priority issues are addressed fully. Further, EEOC should use this tool to ensure that ADA compliance is occurring in work environments where people with disabilities are particularly vulnerable to employment practices banned by the statute.

Charge Investigation

Finding: The new Priority Charge Handling Procedures stress the need for attorneys to be involved in the classification and investigation stages of cases and suggest organizing investigator-attorney teams or "other collaborative arrangements" to accomplish this. This need has been identified by those outside of EEOC as well such as the Chairman of the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce and the Speaker of the House. Attorney involvement in investigations varies among the field offices. The Director of the Office of Field Programs stated that investigative staff and attorney staff are working well together; the form of coordination depends on the office culture. However, even with increased attorney involvement, attorneys are not involved in the intake process unless specifically requested to do so by an investigator.[57]

Recommendation: EEOC should continue efforts to improve attorney-investigator coordination. EEOC should explore ways of using attorneys during charge intake and other investigative procedures. For example, EEOC should initiate a pilot program in which attorneys and investigators jointly conduct intake and investigate charges. EEOC should review and assess any differences in quality or length of time to complete investigations when attorneys are involved. Both attorneys and investigators should participate in this review by providing their personal observations and assessments on the strengths and witnesses of the program.

Determinations

Finding: Under the Priority Charge Handling Procedures, EEOC no longer issues substantive no cause determinations. The procedures state that because the determination no longer explains in detail the disposition of the charge, determination counseling is critical. Most offices attempt to inform the charging party by telephone when a no cause determination is made. In the Charlotte District Office, the charging party is given 5 days to provide additional information; then the case is dismissed. The 1998 joint task force report noted that some offices do not consistently do determination counseling to inform charging parties of the reasons for a determination. Further, there are no formal procedures for charging parties to request reconsideration of their cases. Field offices respond to such requests on a case-by-case basis.[58]

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[56] *See* chap. 6, pp. 195–98.

[57] *See* chap. 6, pp. 198–201.

Recommendation: The determinations sent to charging parties should provide sufficient detail as to why no cause was found, or why the charge was dismissed, and EEOC should establish a formal policy for responding to requests for reconsideration of cases. In addition, the reasons for no cause findings should be in writing.

Alternative Dispute Resolution

Finding: Over the past several years, EEOC has begun to implement alternative dispute resolution (ADR) to resolve certain charges of discrimination more quickly and efficiently than they could be resolved through the traditional investigation, negotiation, and settlement or litigation process. ADR has proven to be effective with issues such as reasonable accommodation. However, because EEOC has not had funding for the ADR program, in most field offices, the program has been implemented on a very small scale and relies almost entirely on volunteer mediators. The President has proposed increasing EEOC's funding, with much of the increase specifically designated for the ADR program. Such an increase would enable EEOC to mount full-scale ADR programs in all of its field offices, allowing more charges to go through the ADR process and generally decreasing the amount of time it takes for EEOC to process a charge.[59]

Recommendation: The Commission strongly supports EEOC's use of ADR as an alternative to its traditional investigation process to reduce its backlog and obtain speedier resolution of cases. ADR should continue to be emphasized by EEOC. However, because EEOC cannot implement ADR effectively without the additional resources requested by the President, Congress should provide EEOC with the resources needed to mount an effective, full-scale ADR program. EEOC should use the additional funds to create a formal ADR program in each of its district offices. In addition, EEOC should ensure that charging parties and respondents do not have to pay for ADR.

Litigation

Finding: Litigation is an essential element of EEOC's ADA enforcement program. In cases of egregious violations of the law, EEOC involvement in a lawsuit demonstrates that it is serious about enforcing the law. EEOC's use of litigation encourages respondents who have discriminated to settle charges of discrimination rather than run the risk of being sued by EEOC. Furthermore, cases EEOC litigates receive a great deal of public attention and as a result have an effect far beyond the parties involved. EEOC believes that it is important to get involved in cases where the agency can advance the public interest[60]

Recommendation: EEOC should continue to use litigation as a central component of its ADA enforcement strategy. EEOC should choose cases it litigates judiciously to ensure that the cases are meritorious and advance the public interest. EEOC should pursue such cases aggressively.

Finding: EEOC and the Department of Justice do not coordinate their ADA activities very well. This is particularly true with regard to employment issues under title II (State and local employers). DOJ only litigates a tiny portion of its State and local employment cases. Part of the problem is that there is not much employment expertise at DOJ.[61]

Recommendation: EEOC and the Department of Justice should coordinate better by working together to ensure that charges relating to State and local employers are handled appropriately. The Department of Justice, for example, should make greater use of EEOC's employment expertise through better cooperative efforts and information-sharing programs.

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[58] *See* chap. 6, pp. 201–02.

[59] *See* chap. 6, pp. 202–07.

[60] *See* chap. 6, p. 202.

[61] *See* chap. 6., pp. 202–07.

Technology

Finding: EEOC suffers from technology limitations that may affect the usefulness of the charge data system (CDS). Both EEOC and outside commentators have noted that EEOC needs to upgrade its computer systems. For example, the EEOC task force report on FEPAs noted that FEPAs were using computers that could not handle the large volume of charges. Further, FEPAs had data transmission problems due to modem or phone line deficiencies, and some staff was not sufficiently trained on the operation of the system. These problems lead to inaccurate and incomplete data.[62]

Recommendation: The CDS provides much valuable information. Funding should be provided for improvements in technology to ensure the accuracy of the data contained in the system. Upgrades to equipment, particularly in the FEPAs, is necessary to ensure accurate and complete data. In addition, future changes to the system should provide for more detailed information. For example, data fields should be added so that EEOC can track when a charge is reclassified into a different category.

Finding: Other technology limitations affect the ability of EEOC's staff to do their jobs. EEOC has outdated and inadequate computer technology that impedes the ability of its staff to conduct aggressive and coordinated enforcement of the ADA and the other civil rights statutes the agency is charged with enforcing. EEOC staff have no e-mail capability, no access at their desks to the Internet or legal research tools, and no easy access to the CDS. In addition, EEOC's headquarters and field offices are not linked through a network system, and as a result are unable to obtain critical information to improve their investigative and litigation efforts. For instance, if EEOC has more than one charge against the same company on the same issue, but these charges are filed in different district offices, EEOC's inadequate computer technology prevents EEOC staff from having access to this information.[63]

Recommendation: Congress should approve the President's request for additional funds for fiscal year 1999 to enhance EEOC's computer technology, and EEOC should move expeditiously to update and network its computers and provide Internet and e-mail capability to its staff.

Finding: Data used for this report had not been through the data "cleaning" process. Thus, some charges contained incomplete or erroneously entered information were not included in the analyses.[64]

Recommendation: Changes should be made to the system so that data entry is easier and, thus, less prone to error. Rather than requiring staff to enter codes, the system should provide a list of bases, for example, from which to choose. Further, date fields should be changed so that only valid dates are accepted. In addition, organizations requesting data should be provided the most recent corrected data set.

Charges Under All Statutes

Finding: More than 50 percent of charges under the EPA, ADEA, and title VII, and just under 50 percent of all ADA cases, result in no cause findings. A "no cause" finding is issued when a full investigation fails to support the allegations.[65] Close to 30 percent of all closures are administrative closures, which includes notice of right to sue requested by the charging party, no jurisdiction, withdrawal without benefits, and charging party's failure to cooperate. Therefore, 80 percent of all charges indicate that no discrimination has occurred. The large number of no cause findings suggests that either many charging parties file nonmeritorious claims that waste EEOC staff time and resources, or EEOC needs to reevaluate its charge processing procedures to ensure that charges are being evaluated and investigated properly.[66]

Recommendation: EEOC should conduct a study to determine the reasons for the large number of no cause findings and administrative closures. If the reason is that many nonmeritorious claims are filed, EEOC should attempt to improve its outreach and education efforts so that members of the public become better informed as to what types of charges have merit under the ADA and other nondiscrimination in employment statutes. Beyond this, EEOC should keep more detailed data on no cause findings. For example, EEOC should keep data on why there was a no cause finding.

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[62] *See* chap. 6, p. 211.

[63] *See* chap. 6, pp. 211-13.

[64] *See* chap. 6, p. 213.

[65] *See* chap. 6, pp. 213–15.

[66] *See* chap. 6, p. 215.

Finding: Since a major new thrust of EEOC's charge processing system is the use of alternative dispute resolution, it is essential for EEOC to have data on ADR closures. It is not clear under which closure category ADR closures fall in EEOC's charge database system.[67]

Recommendation:. EEOC should revise its charge database system to include ADR closures as a separate closure category.

Charges Under the ADA

Finding: One-fifth of the charges citing the ADA involved "miscellaneous" disabilities, such as mental retardation, allergies, and speech impairments, each less than 3 percent of all ADA charges. "Other" disabilities—disabilities not specifically identified in the EEOC charge data system—account for 23 percent of all ADA charges.[68]

Recommendation: EEOC should consider expanding its disability categories, or collapsing some of the less frequently noted categories. EEOC should work hand-in-hand with the disability community to determine which disabilities it should track. Furthermore, EEOC should consider revising this list as the Nation ages and as disability becomes more prevalent in society. However, EEOC should provide a crosswalk to previous disability categories so that trends can be analyzed over time.

Finding: Charge processing time has changed little since the introduction of the Priority Charge Handling Procedures. Virtually the same percentage of charges are closed in less than 6 months and in 6 to 12 months as before EEOC adopted the new procedures. Furthermore, the percentage of charges that take more than 2 years to resolve has risen slightly.[69]

Recommendation: EEOC should do an internal audit to determine why charge processing time has not changed with the institution of the Priority Charge Handling Procedures. Depending on the results of the audit, EEOC should provide further training to its staff on implementing the procedures or revise the charge processing procedures to ensure that the time it takes for EEOC to process charges of discrimination is reduced.

Chapter 7. Assessment of EEOC's Outreach, Education, and Technical Assistance

EEOC Technical Assistance Program

Finding: Title I of the ADA, and the ADA in general is a very complicated statute. Many people, particularly employers, do not know their rights and responsibilities under ADA. Moreover, many disabled people do not know that the ADA exists. EEOC and its field offices, particularly the New York and Detroit offices field offices, have designed and implemented generally effective ADA technical assistance programs. In addition, EEOC has developed a significant amount of technical assistance material on the ADA. However, overall, EEOC does not have a very proactive technical assistance program. For example, EEOC's Office of Legal Counsel goes on sponsor-reimbursed travel to speak on the ADA, but OLC does not have a travel fund specifically earmarked for presentations and other technical assistance activities. In addition, EEOC does not have a strategic plan for its technical assistance efforts. Although EEOC can recount past efforts, it has not produced any clear statements of goals for future efforts in this area.

Technical assistance responsibilities are scattered throughout the agency without an overall plan and clearly defined organizational structure to guide technical assistance activities. EEOC's senior management recognizes the importance of the technical assistance program to accomplishing the agency's overall mission. Since the establishment of the National Enforcement Plan in July 1996, there has been a more focused approach to technical assistance, education, and outreach efforts. However, there does not appear to be significant institutionalized coordination of these efforts by the responsible offices—Office of Field Programs, Office of Legal Counsel, and Office of Communications and Legislative Affairs.[70]

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[67] *See* chap. 6, p. 215.

[68] *See* chap. 6, pp. 215–17.

[69] *See* chap. 6, pp. 217–20.

Recommendation: EEOC needs to revitalize its technical assistance program for the ADA. First, EEOC must create a central technical assistance office in its headquarters to provide direction and coordination of technical assistance efforts on the ADA and the other civil rights statutes EEOC enforces. This office should encompass all technical assistance efforts of the agency including liaison with the field offices. In addition, EEOC should establish an internal outreach, education, and technical assistance coordination committee, composed of representatives of the three responsible offices and the office of the Chairperson, to work in consultation with the central technical assistance office. The committee should meet quarterly to advise the central technical assistance office through the development and implementation of Commissionwide approaches to outreach, education, and technical assistance. Once established and operational, the committee also should review annually the implementation of previously approved efforts and report to the Commissioners.

Second, EEOC should work closely with the President's Committee on Employment of People with Disabilities, which has its own separate technical assistance program, to develop an integrated technical assistance program. For example, the two agencies should develop a memorandum of understanding on technical assistance activities.

Finding: EEOC stated in the ADA technical assistance plan that it would develop and distribute public service announcements to radio and television stations. However, because it was estimated that the cost for a multimedia PSA campaign would be in excess of $400,000, the agency was unable to carry out this initiative.[71]

Recommendation: EEOC should consider developing a national radio PSA campaign as part of its overall technical assistance effort. The agency headquarters central technical assistance office should develop and coordinate the program so that the agency has a consistent, coherent public voice. To ensure that the program covers all geographical areas, the headquarters office should work closely with all agency field offices. The agency should specifically earmark funding for this project.

Finding: The field offices operate with a significant amount of independence and flexibility in conducting their outreach, education, and technical assistance responsibilities. This has led to the development of some innovative technical assistance materials such as the New York District Office's brochure on immigrants' employment civil rights that was published in seven languages and was distributed by the Office of Field Programs (OFP) to other district offices with significant immigrant populations. Until recently, there does not appear to have been a systematic approach by OFP to ensuring that information and materials are exchanged among all of the field offices. Under the current organization, however, a staff person is now responsible for coordinating technical assistance in the field. Further, if funds are available from the revolving fund, there are also plans to establish an outreach coordinator in each district office. In the summer of 1997, OFP held a meeting with the technical assistance coordinators to share ideas to enhance the overall effectiveness of the field technical assistance program. Finally, at the April 21, 1998, EEOC Commission meeting, Acting Chairman Igasaki directed that OFP make available to all field offices the innovative information that has been developed by some of the field offices. The Chairman also directed OCLA to take the lead in developing information packets, videos, and questionnaires for distribution to the public.[72]

Recommendation: The Commission commends EEOC for recognizing the importance of sharing information about the innovative approaches to outreach, education, and technical assistance being developed by its field offices. The agency should institutionalize this process. An annual meeting of the technical assistance coordinators would be one method of ensuring that there is a formal process for sharing accomplishments in the outreach program. At the end of each conference, OFP and the participants should submit a report to the Commissioners.

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[70] *See generally* chap. 7.

[71] *See* chap. 7, pp. 230–31.

[72] *See* chap. 7, pp. 236–39.

Finding: Officials at EEOC acknowledge that the agency has had limited success in reaching underserved communities such as small businesses and minorities with disabilities. Congress also has recognized that the EEOC needed to make a greater effort to reach these groups. The introduction in July 1996 of Local Enforcement Plans with a mandatory technical assistance component ensures that management can evaluate the efforts of the field offices to reach underserved groups. However, it is not evident from interviews with EEOC officials that there is any mechanism to evaluate the effectiveness of past and future outreach and technical assistance efforts specifically designed to reach underserved communities.[73]

Recommendation: EEOC should develop a means of periodically evaluating the effectiveness of the agency's outreach, education, and technical assistance programs to underserved groups. The agency should establish an advisory committee of representatives from outside the EEOC to assist in the development of methods to evaluate the effectiveness of these efforts and to advise on ways to improve the technical assistance program's outreach to underserved communities. EEOC should file periodic reports with the Commissioners on the evaluation of this effort.

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[73] *See* chap. 7, pp. 239–41.

Statement of Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners A. Leon Higginbotham and Yvonne Lee

Introduction

The Americans with Disabilities Act (ADA) is one of the most important civil rights laws ever enacted. Its ongoing purpose is nothing less than "a national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life."[1] As this Commission report concludes, in the short period since its enactment, the employment provisions of the ADA have already begun to help do just that. However, in spite—or perhaps because—of its success, the ADA has been subjected to a great deal of criticism. To be sure, the nature of that criticism is mostly inconsistent, not to say outright incoherent. Thus, critics have accused the ADA of doing both too little and too much: too little because it has not increased by a large enough margin the number of people with disabilities in the work force; too much because it has forced employers to hire people whose disabilities render them unqualified to perform job functions; too little because it has made employers wary of taking a chance on people with disabilities; too much because it has encouraged frivolous lawsuits from people whose disabilities are not genuine.

Of course, the easiest response to the criticism that the ADA is not working fast enough is to point out, as did Justin Dart, the former Chairman of the President's Committee on Employment of People with Disabilities, that "[i]t is misleading and dishonest to suggest that the ADA is a failure because it has not in sixty months solved problems that the ten commandments have not solved in more 3,000 years."[2] It is equally easy to answer the criticism that some ADA lawsuits may have been without merit by pointing out that, just as Justice John Harlan cautioned that "hard cases make bad law,"[3] marginal cases make for bad arguments. In short, much of the criticism of the ADA would not necessarily deserve a response if it did not betray a deeper philosophical viewpoint on the value of civil rights legislation in our society and the role of administrative agencies in assuring justice for all Americans. Because we believe in the enduring value of civil rights statutes, and because we favor vigorous enforcement of such statutes, we write this additional statement.

I

The ADA Empowers People with Disabilities and Enriches Our Society

Individuals with disabilities have been called the largest minority group in this country. Data from a 1990 U.S. Census Bureau survey exposed a staggering 49 million Americans with disabilities,[4] many of whom were unemployed. Specifically, 56 percent of the disabled population were of working age—between the ages of 21 and 64. Yet, over 60 percent were unemployed.[5] Obviously, the incorporation of the disabled into the work force is a matter of grave concern just as increasing the hiring of the disabled is an enormous challenge.[6] However, to claim that the ADA has a negative impact on hiring is wrong for two reasons.

As an initial matter, such an argument is counterfactual. Recent data from the U.S. Census Bureau revealed a marked increase in the employment of persons with disabilities since the enactment of the ADA. For example, the employment of persons with severe disabilities increased almost 3 percent from 1991 (23 percent) to 1994 (26.1 percent), resulting in 800,000 more jobs.[7] Improvement in the quality of life for Americans with disabilities have also been attributed to the ADA. In a private survey by the United Cerebral Palsy Foundation, an overwhelming 96 percent of the sampled 1,330 disabled people and their families reported that the law had improved their lives.[8] Empirical studies also register positive results. A recent longitudinal study of the experiences of over 1,100 adults with mental retardation in Oklahoma found that, through government funding and private efforts, positive change occurred in their lives since the passage of the ADA. Relative unemployment levels for participants declined, and the proportion of participants in competitive employment increased significantly.[9]

More important however, one wonders whether critics who wield numbers and statistics have ever considered it worthwhile "to place the ADA within a framework apart from that of marketplace morality."[10] After all, that 49 million people are—and have remained—a "minority" is not a twist of fate nor an accident of history, nor a matter of individual discrimination. Rather, "throughout history, people with disabilities lived with two limitations: one, the actual physical or mental impairment, and two, society's differential treatment caused by reactions to the impairment."[11] Accordingly, the ADA was enacted, not only to protect people with disabilities from acts of discrimination, but also "to attack the myths and stereotypes associated with disabilities and in order to change the attitudes of people in this country."[12] Certainly, since its enactment, the ADA has done much to change the attitude of employers and to empower people with disabilities.[13] In other words, "it is justice that [the ADA is] after, and justice is not always, or even often, amenable to precise measurement, or even any measurement at all."[14] Thus, to always insist on "counting heads" is, in a real sense, a regrettable diminishment of both the ADA's success for people with disabilities and its beneficial value to our society.

II

EEOC Enforcement of the ADA Is Fair and Consistent with Congressional Intent

As is the case with any other civil rights statute, the ADA would not be effective unless it was vigorously enforced through administrative resolution and private litigation. Effective administrative enforcement of civil rights legislation requires that the agency responsible for its implementation not just mechanically carry out the law, but also use its constitutional discretion and rule-making authority to give the statute shape and substance. It is far too late in the day to think that administrative agencies serve—or should serve—any other purpose. As far back as 1825, Chief Justice John Marshall recognized that any time Congress enacts a statute it necessarily gives the power "to those who are to act under [the] general provisions to fill up the details."[15]

Yet one recurring criticism of the act is that the EEOC and private litigants have engaged in frivolous lawsuits. To begin with, the argument rests on the false premise that these lawsuits were frivolous because, on occasion, a finder of fact may have ruled against a plaintiff. This is wrong as a matter of law and as a matter of fact. A frivolous lawsuit is prohibited by Rule 11 of the Federal Rules of Civil Procedure. The fact that these cases were adjudicated on the merits is proof enough that the court found them not to be frivolous. Moreover, there is absolutely no evidence that the ADA has encouraged more lawsuits than other statutes. Indeed, the fact that critics of the ADA tend to recycle the same few marginal case examples is a strong indication that in the overwhelming majority of cases the act is working to integrate people with disabilities into the work force.[16] Certainly, a fair and reasoned examination of the statute would focus on the cases that lie at the center not those that hang on the margins.

In any event, more often than not, the claim that the ADA encourages frivolous lawsuits is a thinly veiled attempt at perpetuating the stereotype "that there are two groups among the disabled population: those with 'traditional' disabilities such as the blind or people who use wheelchairs who are worthy of compassion or pity, and those whose disabilities are not 'genuine' but are convenient excuses for special treatment."[17] This stereotype is not only pernicious, but it also goes against the very mission of the ADA which, after all, was enacted to combat the myth that there are more or less deserving disabled people. In fact, Congress expressly refrained from providing an exhaustive list of disabilities under the ADA precisely because it recognized that the term disability should not be subject to a limited *and limiting* definition. Admittedly, we all have our own definition of who is disabled and, for most of us, that definition may be perfectly sincere. However, if as Shakespeare wrote "there are more stars in heaven and earth [] than are dreamt of in [our] philosophy,"[18] then surely one of the purposes of the ADA is to expand our own philosophy on what a disability is and what a person with a disability can do.

Conclusion

Obviously, we need to do more work if we are to achieve the "national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life."[19] In particular, we should be concerned that the pattern of EEOC filings with an emphasis on termination and not hiring claims may suggest that the majority of individuals with disabilities still are not yet able to take full advantage of their ADA rights. They may need greater education, information and help in utilizing what is available. However, to say that is not to imply that the ADA has not been effective. Rather it is to suggest that more vigorous enforcement is needed.

Those who argue that vigorous enforcement discourages employers from hiring people with disabilities seem to believe that civil rights enforcement should operate according to the principles of the biblical definition of faith: the evidence of things unseen and the hope of things to come. The "unseen evidence" is the belief that the ADA is a hindrance to employment, even though it has already increased employment; the "hope of things to come" is the supposition that without the ADA we will stop discriminating, even though our history, culture and customs taught—and teaches—us to discriminate. We need not deny the real evidence of our experience; we need not deny the hope the ADA has so far brought us. The promise of the ADA—to provide opportunities for persons with disabilities—benefits us all if we achieve their inclusion in every aspect of American life. This enforcement report is a small contribution to the goal of realizing that promise through effective implementation of the ADA.

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[1] House Committee on Energy and Commerce, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 4, at 25 (1990).

[2] Quoted in Paul Steven Miller, The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit, 49 Case W. Res. 217, 221 (1998).

[3] *United States v. Clark*, 96 U.S. 37, 49 (1878).

[4] John M. McNeil, U.S. Dep't of Commerce, Americans With Disabilities: 1991–1992 Data from the Survey of Income and Program Participation 5 (1993).

[5] President's Committee on Employment of People with Disabilities, Statistical Report: The Status of People with Disabilities.

[6] For a general discussion on EEOC efforts at enforcement of the employment provisions of the EEOC, see Paul Steven Miller, The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit, 49 Case W. Res. 217 (1998); Paul Steven Miller, The Americans With Disabilities Act in Texas: The EEOC's Continuing Efforts in Enforcement, 34 Houston L. Rev 777 (1997).

[7] Employment Rate of People with Disabilities Increases under the Americans with Disabilities Act, (President's Comm. on Employment of People with Disabilities, Washington, D.C., July 22, 1996) (jobs for the severely disabled increased from 2.91 million in 1991 to 3.71 million in 1994).

[8] United Cerebral Palsy Ass'n, Is ADA Working?: 1994 Progress Report on ADA, American Business 4 (1994).

[9] *Id.*

[10] David J. Popiel, The Debate over the Americans with Disabilities Act: A Question of Economics or Justice? 10 St. John's J.L. Comm. 527, 528 (1995).

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[11] Elizabeth Clark Morin, Americans With Disabilities Act of 1990: Social Integration Through Employment, 40 Cath. U.L. Rev. 189, 192 (Fall 1990).

[12] Louis Graziano, The Americans with Disabilities Act: Both Sword and Shield, 10 St. John's J.L. Comm. 511 (1995).

[13] Paul Steven Miller, The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit, 49 Case W. Res. 217, 224 n.38 (1998) (reporting that a July 1995 Louis Harris and Associates Survey of senior corporate executives found that 70% of the executives surveyed supported the ADA and did not favor a weakening of the law.)

[14] David J. Popiel, The Debate over the Americans with Disabilities Act: A Question of Economics or Justice? 10 St. John's J.L. Comm. 527, 528 (1995).

[15] *Wayman v. Southard*, 10 Wheat. 1 (1825); See also, *United States v. Grimaud*, 220 U.S. 506 (1911) (applying Justice Marshall's theory specifically to administrative agencies.)

[16] Below are some often-recycled examples. A careful examination of the facts show these cases to raise far from frivolous issues.

- In 1997, a Ryder Systems Truck driver won a 5.5 million verdict after claiming under ADA that the company unfairly removed him from his position as truck driver based on safety concerns after he suffered an epileptic seizure. In fact, the employee was desperately seeking an alternative job so that he might not become dependent and unemployed. He asked the company to place him in March 1993 in a job loading automobiles onto railroad cars within a confined area. Medical experts hired by the plaintiff and the company said he could perform the essential functions of the proposed job safely, but the company refused to place him in that position.

- In *Davidson v. Midelfort Clinic*, 133 F.3d 499 (1998), the plaintiff disclosed during her interview for a job that she suffered from ADD, a chronic psychological disability that affects a person's ability "to concentrate, to learn, to organize one's thoughts, to verbalize them, and to formulate explanations." The plaintiff had struggled with ADD for many years, although she was not diagnosed with the disability until late in life. Notwithstanding her disability, the plaintiff, through "hard work, adaptive techniques, and help from her professors," had excelled in both high school and college. In her graduate course work she obtained a 3.87 on a 4.0 point scale. Throughout her education, the plaintiff would compensate for her disability by laboriously writing out passages of everything she read. Her claim was whether her employer should have reasonably accommodated her disorder by cooperating with her to find solutions, rather than firing her for having a backlog of dictation.

- In *EEOC v. Wal-Mart Stores, Inc.*, No. CV-95-1199JP (D.N.M. Feb 21, 1997), the EEOC sued Wal-Mart for refusing to hire a plaintiff who did not have a right arm. The refusal to hire followed questions to the plaintiff about his current and past medical conditions. The EEOC based its suit upon requirements in the ADA prohibiting such questions. Prior to the ADA, such information was frequently used to exclude applicants with disabilities—both hidden and visible—before there was any determination about the individual's capability to perform the particular job.

[17] Paul Steven Miller, The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit, 49 Case W. Res. 217, 221 (1998).

[18] Hamlet, Act 1, sc. 5.

[19] See *supra* note 1.

Statement of Commissioner Russell G. Redenbaugh

The two-part report by the U.S. Commission on Civil Rights assessing Federal enforcement of title I (EEOC) and title II, subtitle A (DOJ), of the Americans with Disabilities Act is an important effort. It represents the first indepth study of disabilities issues by the Commission since the ADA was signed into law by President Bush on July 26, 1990. As the Commission's statutory enforcement report for fiscal year 1998, it also aims to fulfill our annual statutory obligation to report to the President and to Congress on the enforcement of Federal civil rights law in a particular area—this year, the ADA.

The report is important for me, professionally and personally. I am blind. As a member of a class protected under ADA, and as a Commissioner, I am committed to expanding opportunities for all Americans, and especially for the 54 million Americans who are disabled. I am also committed to doing what works. Now that 8 years have passed since the passage of the ADA, it is important to stop and look at what has happened. Consider these findings from a new, landmark survey by Louis Harris and Associates, commissioned by the National Organization on Disability:

- 71 percent of disabled persons of working age (18 to 64) are not employed, versus 21 percent of nondisabled Americans, a gap of 50 percentage points. In 1986 (when Harris first conducted this poll), 66 percent of the disabled were not employed, versus less than 10 percent of all Americans.
- 34 percent of adults with disabilities live below the poverty line (i.e., in households earning less than $15,000 in annual income), versus 12 percent of those without disabilities. The income gap—approximately 20 percentage points—has remained virtually constant since 1986, when the percentages were 51 percent and 29 percent, respectively.[1]

The Harris survey also looks at gaps between those with and without disabilities in other areas, including education, frequency of socializing, attendance at religious services, political participation, and access to transportation and health care. But as the survey's findings make clear, "Employment continues to be the area with the widest gulf between those who are disabled and those who are not." The new findings are disturbing, especially when one considers that there are approximately 20 million more people working today than in 1986 and the overall unemployment rate has gone down by 35.7 percent, from 7 percent in 1986 to about 4.5 percent today. Obviously, the unemployment rate for the severely disabled is a serious social problem and, in the 8 years since passage of the ADA, there is no evidence of any improvement. In fact, there is reason to believe the EEOC's enforcement of title I may diminish the employment prospects for persons with disabilities by actually encouraging employers to discriminate for fear of future legal liabilities.

I must commend the staff of the USCCR's Office of Civil Rights Enforcement for preparing a report that, on the whole, is carefully researched and clearly written. The report provides a thorough outline of the ADA enforcement activities of both the EEOC and the DOJ. It also provides a thoughtful analysis of the background and history of America's disability policy and the debate that gave rise to the passage of ADA. The discussions of the complexity of the law and the numerous and often contradictory decisions by the courts over the past several years are especially helpful in illuminating both the challenges and opportunities that the ADA continues to present for disabled Americans and for employers and employees alike.

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[1] 1998 National Organization on Disability/Louis Harris & Associates Survey of Americans with Disabilities, Washington, D.C., July 23, 1998.

It was not the original purpose of the Commission's report to ask whether the law is bringing about its intended consequences. However, the report does stray into the policy area, albeit without producing the necessary analytical framework to support its policy recommendations. It advocates an expansion of EEOC's interpretation of the law, in a way that may or may not have been contemplated in the original legislation, without ever addressing this fundamental question: Are the EEOC's regulations for enforcing title I actually improving employment possibilities for the disabled?

As the report clearly points out, since the passage of the ADA "many basic issues, such as who is protected by the act and what employers or other covered entities are required to do under the act, remain unresolved." The report also rightly acknowledges that, "In large part, these issues arise out of inherent ambiguities in the language of the statute that have not been resolved through the issuance of implementing regulations or by the Federal courts." While I certainly agree with the problems the report identifies in this regard, I strongly disagree with its basic direction for encouraging the executive branch to expand the ADA beyond its current interpretations in a way that would only serve to further distort and trivialize the law's intent and that would perhaps even increase public hostility toward the disabled.

My greatest concerns with this report are based not on the problems it has identified, but on its recommendations for addressing those problems. For example, the report contains numerous calls for expanding EEOC's rulemaking and/or the development and issuance of additional "policy guidance" with respect to the definitions and concepts of "qualified individual with a disability," "reasonable accommodation," "undue hardship," "mitigating measures," and "major life activities." The underlying thrust of the recommendations is that "EEOC should adopt a policy of pursuing regulatory additions in areas where the courts have consistently opposed the EEOC's position on key ADA issues. . . ."

The report repeatedly takes the position that EEOC is doing an "exemplary" job in interpreting and enforcing the ADA. It posits that where the courts may have struggled or disagreed with the EEOC's interpretations, this is because "Many Federal judges appear either to misunderstand the ADA or be hostile to it." Although conceding that the law is complex, the report does not draw the corollary that difficulties of legal interpretations can result from such complexity and are not necessarily an indication of bad will. Consider this array of cases, which constitute only a small sampling of the issues that have come before almost every Federal circuit over the past few years. **Many of these cases defy credulity and are absolutely not what we intended when we passed the ADA in 1990:**

- A Federal jury awarded a New Mexico man who lost part of his arm in a car accident $157,500 after a Wal-Mart interviewer asked him an illegal question when he applied for a stocker's job. The question was, "What current or past medical problems might limit your ability to do a job?" The February 1997 award—which included $150,000 in punitive damages—is the largest ever involving an unlawful preemployment medical inquiry. See *EEOC v. Wal-Mart Stores, Inc.*, 1998 WL 278758 (D.N.M.).

- A Wisconsin psychotherapist with attention deficit disorder who was fired for falling behind on her paperwork won reinstatement of her claim under ADA as a result of a Seventh Circuit decision last January. The court noted that ADA may reach those "who may require some kind of accommodation from their employer, notwithstanding their inability to demonstrate a present impairment that is substantial enough to qualify as disabling under the ADA." *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998)

- In January 1997, the EEOC won a $5.5 million verdict for a former Ryder Systems truck driver, claiming under ADA that the company unfairly removed him from his position citing safety concerns after he had suffered an epileptic seizure. The driver was hired by another firm, had a seizure while driving, and crashed into a tree. The trial judge reduced the award to approximately $491,000, and both sides have filed appeals with the Sixth Circuit. *EEOC v. Complete Auto Transit, Inc.*, E.D.Mich., verdict entered on Jan. 6, 1997, notice of appeal filed Nov. 10, 1997 (No. 97–2202), notice of cross-appeal filed July 22, 1998 (No. 98–1806)

- A former Federal employee claimed that his threatening behavior on the job was tied to his alcoholism (a covered disability under the both the Rehabilitation Act of 1973 and the ADA). The Tenth Circuit Court of Appeals rejected the man's claim, reasoning that "We cannot adopt an interpretation of the statute which would require an employer to accept egregious behavior by an alcoholic employee when that same behavior, exhibited by a non-disabled employee, would require termination." (*Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996))

- In February 1997, a secretary with depression failed to persuade the Court of Appeals for the Seventh Circuit that her employer's refusal to grant her an indefinite leave of absence or permission to work at home violated the ADA. The court reasoned that, "Not only is it doubtful that an executive secretary could perform her essential job functions at home, but we have stated as a matter of law that working at home is not a reasonable accommodation." *Johnson v. Foulds, Inc.*, 111 F.3d 133 (7th Cir. 1997), unpublished disposition, 9 NDLR P 165, 1997 WL 78599 (7th Cir. (Ill.))

- Also in February 1997, the U.S. District Court for the Eastern District of Michigan threw out the ADA claim of a computer salesman with a facial scar, ruling that although a scar might qualify as a disability, the employee had failed to show any nexus between the scar and management's decision to fire him. *Van Sickle v. Automatic Data Processing, Inc.*, 952 F.Supp. 1213 (E.D.Mich. 1997)

- In September 1997, a Federal judge in New York dismissed the ADA claim of a fired employee who was diagnosed with colitis and depression. After a 2-week stay in a psychiatric hospital, the woman had returned to work and was offered an alternative assignment by her employer. She refused to accept the assignment and was fired for insubordination. The judge rejected the woman's claim that her colitis prevented her from working and that her depression substantially limited her ability to perform her job. The court also rejected the woman's assertion that her condition caused her to be disinterested in sex, which she argued was a major life activity covered by ADA. *Johnson v. New York Medical College*, 10 NDLR P 370, 1997 WL 580708 (S.D.N.Y.)

- Several years ago, an AT&T employee sued the company for failing to accommodate his alleged disability (depression and severe anxiety) by providing him with a job without prolonged and inordinate stress. The Third Circuit ruled in January 1998 that a request for a stress-free workplace is not a reasonable accommodation under the ADA. *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576 (3rd Cir. 1998)

- After he was fired in 1994, an industrial process engineer at Guilford of Maine filed suit under ADA based on his inability to get along with others. In response to several warnings he had received from his supervisor about a marked deterioration in his attitude, his psychologist told the company that the man's duties should be restricted "to avoid responsibilities which require significant interaction with other employees." The First Circuit rejected the ADA claim, saying that while "ability to get along with others" might be considered a major life activity under the ADA in some circumstances, in the plaintiff's case the evidence did not establish that he had difficulty in interacting with anyone other than his supervisor. *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997)

- Characterizing EEOC's position as "troublesome," a Federal judge in Detroit ruled last January that the agency should not have sued the Hertz Corp. for disabilities discrimination when Hertz dismissed, for reasons of misconduct, a "job coaching service" engaged to help mentally retarded workers. Three months after the employees started working for Hertz at the Detroit airport in early 1994, the two job coaches were observed by several Hertz supervisors "engaged in rather passionate lovemaking" in the front seat of a car, while their two charges were in the back seat. The EEOC filed suit for the job firm (which received government funds for its coaching service), alleging that the provision of a job coach was a reasonable accommodation under ADA, and that once the company hired the employees, it was obligated to continue that accommodation indefinitely. The court compared the lawsuit to the fairy tale about the emperor's new clothes, and characterized EEOC's position as an unwarranted expansion of the ADA that would have the effect of punishing employers for hiring persons with disabilities. *EEOC v. Hertz,* 7 A.D. Cases 1097, 11 NDLR P 293, 1998 WL 5694 (E.D.Mich.)

- In the case of *Smith v. Midland Brake Inc.*, the Tenth Circuit Court of Appeals ruled last March that Midland Brake did not violate the ADA by refusing to rehire a former light assembler, who was terminated after he became unable to work because of a chronic skin condition. The company attempted to accommodate the employee by assigning him to work that involved less lifting and reducing his exposure to irritants in the job. The man took a leave of absence, received $20,000 to settle his workers' compensation claim, and was terminated. In his suit against Midland Brake, he argued that the company was obliged to find an alternative position for him within the company. *Smith v. Midland Brake, Inc.*, 138 F.3d 1304 (10th Cir. 1998)

- Also last March, the First Circuit Court of Appeals ruled that a Massachusetts trucker who asked to be allowed to maintain a special driving route to accommodate his fear of crossing bridges was not fired in violation of the ADA. The court ruled in favor of the employer, who testified that the man had been fired because he was caught along with two other drivers falsifying travel logs required by the U.S. Department of Transportation. *Champagne v. Servistar Corporation*, 138 F.3d 7 (1st Cir. 1998)

- A 20-year veteran employee of Southwestern Bell Telephone Co., who was fired for verbally abusing and striking a female coworker, had his ADA claim dismissed in the Fifth Circuit. His contention was that his outburst was caused by post-traumatic stress disorder (PTSD) that resulted from an incident 4 months earlier when he rescued a drowning woman. During an evaluation period following the outburst, the company decided to dismiss him after receiving an anonymous letter from employees in the man's department accusing him of being a "disgusting, dangerous and abusive man and manager." The court found that the plaintiff failed to demonstrate that his PTSD substantially limited his major life activities, observing that after he left Southwestern Bell, the man ran his own software distribution business for almost a year and eventually was hired as a senior consultant with another company. *Hamilton v. Southwestern Bell Telephone,* 136 F.3d 1047 (5th Cir. 1998)

- In the Sixth Circuit last May, the court found that the offer of the City of Middletown, Ohio, to reassign a disabled police officer to a desk job was a reasonable accommodation under the ADA, even though it was not the accommodation preferred by the employee. As a result of on-the-job injuries to his neck, shoulders, back, and legs in the late 1980s, the police officer had missed a considerable amount of work time, and disputes arose about the legitimacy of his absences. The officer ended up receiving a 45 percent permanent disability retirement, but then filed suit under ADA, arguing that the city had failed to accommodate his disability by not allowing him to work the 11:00 p.m. to 7:00 a.m. shift or transferring him to a detective position, both of which he claimed were less stressful. Because the man's injuries restricted him to lifting no more than 50 pounds and he needed a job in which frequent absences would not adversely affect the operation of the department, the court found that the city's offer of the desk job constituted a reasonable accommodation. *Keever v. City of Middletown*, 145 F.3d 809 (6th Cir. 1998)

- In the case of *Mathews v. Trilogy Communications*, the Eighth Circuit Court of Appeals ruled that the termination of an insulin-dependent diabetic traveling sales representative, after he became uninsurable because of his bad driving record, did not establish disability-based discrimination, since at the time of termination he no longer met the same professional requirements—i.e. having a valid driver's license and being insurable under the employer's insurance policy—as when he was hired. The court's reasoning was that these were not just mere company rules, but rather objective qualifications for the job because sales personnel must be able to drive to clients' locations. The decision also referenced the man's failure to tell management about his prior arrest for driving under the influence of alcohol. *Mathews v. Trilogy Communications, Inc.*, 143 F.3d 1160 (8th Cir. 1998)
- In another Eighth Circuit decision, *Cody v. Cigna Healthcare of St. Louis*, the court of appeals rejected a nurse's claim (previously rejected by the EEOC) that she was constructively discharged because of her alleged disability which caused her to become "anxious in elevators, while driving, and while in perceived high-crime neighborhoods." After the nurse's request for reassignment to other neighborhoods was denied, she was observed by other employees "sprinkling salt in front of her cubicle to 'keep away the evil spirits,' staring off into space for an hour at a time, drawing pictures of sperm, and talking about a gun." Cigna offered a paid medical leave on account of the woman's alleged depression and requested that she see a psychologist before returning to work. The woman refused that offer and decided to quit. The court found that even though the woman was diagnosed three years after she quit her job as having schizotypal personality disorder, she was always able to work and got good reviews prior to quitting, and she offered no evidence of diagnosis of depression. *Cody v. Cigna Healthcare of St. Louis, Inc.*, 139 F.3d 595 (8th Cir. 1998)

Most of these cases speak for themselves. While they involve a range of claims and outcomes, they all help illustrate the extent to which the definitions and concepts of title I have been expanded in almost every way imaginable, with the resultant trivialization of "disability." Is it any wonder that the courts are "all over the map" on the ADA? These cases also show the extent to which a law like the ADA can be used as a tool for turning the workplace into what Walter Olson has aptly called "The Excuse Factory."[2]

It might be argued, perhaps, that for all the claims that are dismissed, overturned, or deemed frivolous, there could be an equal number of legitimate, well-founded complaints involving disabled persons who have been unjustly shut out of a job or denied a reasonable accommodation to allow them to perform a job they are both qualified and eager to perform. It is interesting to note that, according to one estimate, between 1992 and 1997 the EEOC received more than 90,000 complaints filed under title I of the ADA, and almost half (49.6 percent) were found, by the EEOC, to have no reasonable cause. What seems to be happening is that, even with the EEOC's rejection of half of its complaints, the courts are dealing with many cases that appear outrageous to most Americans and that damage the reputation of both the ADA and those of us with severe disabilities. The fact that these kinds of cases are growing in number is especially disturbing at a time when 70 percent of the severely disabled are not employed and about 7.5 million Americans remain on the social security disability rolls.

Disabilities do exist. They do limit the abilities of people, perhaps not as much as some think, but the effect is not trivial and it is certainly real. Prejudice and ignorance are also undeniably real. Often employers "globalize" a disability that may exist in one area by assuming an inability in all areas. That is why the Americans with Disabilities Act is needed. The tragedy is that public attention, which should be focused on ways to encourage the employment of persons with disabilities, has been diverted by the continued abuse of title I, as illustrated by the kinds of cases listed above. And as more and more of these cases come to light, more and more Americans have begun to think of the ADA (to borrow the title of a recent news report) as "The Americans with Minor Disabilities Act."[3]

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[2] Walter K. Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: The Free Press, 1997).

One clear indication that those who have benefited most from the ADA are not the severely disabled is that about 87 percent of complaints to the EEOC come from individuals who are already in a job. Similarly, from my research, it appears that the overwhelming number of ADA-related court cases involves firing, rather than hiring, decisions. Considering that the hiring of the disabled was a key motivator of the ADA, and that only about 30 percent of the severely disabled are in the work force, this is rather shocking. It seems to me to be what Sherlock Holmes might call "the dog that didn't bark."

Why is there so little caselaw claiming discrimination in the hiring of the disabled? It is unlikely that this is because no discrimination occurs in the hiring process. From my own experience, I have found that discrimination, particularly when it occurs at the hiring stage, is very difficult to measure and very difficult to prove. In fact, there is probably no direct evidence. There is only evidence coming from an understanding of economics—from the notion of trade-offs and economic scarcity and choice. If we look from this perspective, we can see that the EEOC's title I regulations may actually encourage discrimination, insofar as they tend to reduce the thousand-fold considerations of hiring down to one: membership in a protected class.

My personal experience is that discrimination against people with disabilities is largely based on ignorance and misunderstanding, rather than exploitation and malicious intent. What comes into play are the "myths, fears, and stereotypes" that are mentioned frequently in the Commission's report. But the proliferation of cases like the ones cited above only deepens the misunderstanding and increase the distrust. Similarly, with its approach of expanding the application of the ADA's key definitions and concepts, this report would only take us in a direction that could encourage further abuse and misunderstandings.

Again, it is not the purpose of the report to decide where the law has strayed far from its original good intentions. Nevertheless, throughout its discussions of the complex issues that have arisen since passage of ADA, these crucial questions remain unanswered: Where is the enforcement effort not helping? Where may it actually be harming those it was intended to help?

I have found that when you are seeking a job you usually have to be able to demonstrate that you are equally competent, if not better than other candidates. That is a high standard, but the right one. Employers should always seek to hire the most qualified. But this can be doubly hard for the disabled candidate, particularly if the potential employer operates from an assumption that you cannot perform the duties of the position because of your disability. How can you demonstrate competence before you are hired, especially for that first job? Also, the added cost of providing "reasonable accommodation" and the risks of a future EEOC lawsuit are powerful incentives for an employer to perpetuate his presumption that you with your disability cannot do the same job an "abled" worker can. Imagine, if you will, that there are five candidates for a position; that two are obviously not qualified; and that of the three remaining candidates, you are the only one with a disability. The obvious incentive for the employer is to take what may look like the safest (and less costly) course of action and hire one of the other two candidates. Thus, your career is stunted before it even begins. Your only hope is to find an employer who wishes not to discriminate and who is willing to pay extra to exhibit virtuous behavior.

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[3] Joseph P. Shapiro, "The Americans with Minor Disabilities Act: The Surprising Beneficiaries of the Law," *U.S. News & World Report*, July 6, 1998, pp. 41–42.

As a member of a class that is protected under ADA, I think it would be hard for me to secure employment today. In 1969 (more than 20 years prior to enactment of the ADA), I was hired by a Philadelphia investment firm on the basis that if it didn't work they would call it off—"no harm, no foul." The standard that applied to me was basically the one that applied to everyone else: If you can do the job, it's yours, but if it turns out you cannot do the job, we're under no obligation to keep you. Today, we could not make that contract and expect it to stick without potential legal liabilities under title I. It is much easier to not hire someone who might be a future legal liability than it would be to terminate him once he has been hired.

This higher risk is a barrier to hiring members of the protected class. An over-expansive application of ADA may create the impression that members of the class it protects essentially become what is termed in human resources jargon "fire proof." The impression (and sometimes the reality) can also be that the "normal" standard (i.e., that if you are disabled and can do the job you are protected by the ADA) becomes distorted to the extent it becomes a tool which an employee may use to *become* "fire proof." The effect that Federal enforcement efforts can have in this regard, although very difficult to measure, cannot be discounted if the ADA is to achieve its purpose, which is to integrate the disabled into American society to the fullest extent possible.

I had hoped that, in assessing EEOC's enforcement efforts for title I, the Commission's report would have explored the impact that these efforts might have on the hiring process. I could not help but be struck by the number of times the report characterized EEOC's regulations and policy guidance as "thoughtful," "insightful," "thorough," "skillful," "consistent," and "common sense." However, there is very little discussion, if any, as to whether employees and employers involved in the actual hiring process, particularly small businesses, share that assessment.

As I have explained above, my own fear is that the ADA implementing regulations can have a chilling effect on the hiring of the disabled. I confess that it was not until I read the section on EEOC's ADA enforcement guidance on "Preemployment Inquiries and Medical Examinations," that I really understood the length and breadth of some of the current requirements. For example:

- In the "pre-offer stage," an employer is not permitted to ask any kind of disability-related questions or questions that are likely to elicit information about a disability.

- An employer may ask an applicant whether he or she can perform different functions of the job itself, including whether an applicant can perform those functions "with or without reasonable accommodation." But the employer may not "ask a question in a manner that requires the individual to disclose the need for reasonable accommodation."

- An employer may not ask, at the pre-offer stage, how many days an applicant was sick or on sick leave in his or her former position, because this question relates directly to the severity of an individual's impairments, and severity is a criterion for determining whether an impairment is "substantially limiting" to a "major life activity" and thus a disability under the ADA.

- Unless they are asking specifically about the ability to perform a job function, employers may not ask whether applicants can perform "major life activities" such as standing, lifting, or walking because such questions "are likely to elicit information about a disability."

- Potential employers may not ask applicants questions about their workers' compensation history because, again, such questions are likely to elicit information about a disability.

- Employers may not ask questions about lawful drug use, since these, too, go to the severity of an impairment. An employer may ask questions about prior illegal drug use, so long as the employer does not ask about *addiction* to drugs, since this is a covered disability under the ADA.

What I believe this sampling of forbidden questions helps illustrate is this: that laws and regulations that are designed to enhance opportunity and expand rights often can end up serving as constraints and limitations to both. With its numerous calls for the issuance of additional regulations and/or "policy guidelines," and its many recommendations for "clarifying" or "expanding" its interpretations of the key terms and concepts of the ADA, the present report takes an approach that may only add to the regulatory disincentives to the hiring of the disabled. Perhaps what is needed is an additional study by the Commission to explore the tremendous disincentives and problems that the current system may present, for the potential employer and job seeker alike.

In general, the present report tends to endorse the EEOC's position with respect to the various controversies of the past several years (for instance, the debate regarding psychiatric disabilities). However, I was pleased to note that it does attempt to factor in some noteworthy views from the private sector. The report includes, for example, a few references to the response from the Equal Employment Advisory Council (EEAC), which represents over 300 of the Nation's largest private sector corporations. The EEAC was asked, among other things, for its assessment of EEOC policy guidance and, specifically, for its views as to whether EEOC guidelines adequately reflect the intent of Congress in enacting the ADA. It is important to read the council's response, beyond the excerpts contained in the USCCR report:

> The EEOC's initial substantive regulations, for the most part, adequately tracked Congressional intent in enacting the ADA. Since adoption of the regulations, however, the EEOC's enforcement guidance has pushed the boundaries of Title I in every conceivable direction. Over the years, through these documents, the agency has doubled the number of "major life activities" that give rise to ADA coverage, has adopted an interpretation of "qualified individual with a disability" that contradicts the statutory definition, and has attempted to read the word "reasonable"—a critical modifier in defining "accommodation"—out of the statute.[4]

The council's response then goes on to cite specific examples of where the EEOC's guidance has taken some positions that "defy common sense." To the staff's question as to whether the association could identify "any areas where EEOC needs to clarify [its] positions further or where EEOC has not issued policy guidance but should," the council responded, "EEAC does not believe that there are other areas in which the EEOC needs to clarify its position further."[5] In fact, a key point the council makes is that the EEOC "should place itself on constant guard against external and perhaps internal pressures to broaden either the scope of coverage or the scope of an employer's responsibility."[6]

The Commission's report would have done well to follow up on these points in greater detail. There is a growing perception, especially among the severely disabled, that the enforcement agencies have been ignoring *their* personal experiences and trying to fit everything—from paraplegia to personality disorders, epilepsy to allergies, blindness to attention deficit disorder, to name a few—into the same kind of legal mold and, thus, the same kind of traditional civil rights framework. To the extent that the report acknowledges this problem, it does so by advocating, in a number of its recommendations, that the EEOC "clarify" its current guidelines. Certainly, there is something to be said for clarification, especially in those areas where controversies have arisen. But what is the best way to seek such clarification?

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[4] Ann Elizabeth Reesman, General Counsel, EEOC, letter to the Assistant Staff Director for Civil Rights Evaluation, U.S. Commission on Civil Rights, Mar. 2, 1998, p. 5.

[5] Ibid., p. 6.

[6] Ibid., p. 4.

And would this be accomplished more effectively and appropriately by the executive branch, or by the legislative branch, of government?

Many will argue that now is not the time to reopen the ADA for legislative discussion. Nevertheless, my view is that, as the elected branch of government, Congress can and should be held accountable for the laws it passes. When Congress delegates so much of its regulation-making authority to an executive agency, it not only blurs the separation of powers but also invites precisely the kinds of challenges and conflicts that are described in this report and in reports appearing across the country. That is why the United States Commission on Civil Rights' recommendations for having EEOC "develop" the law through its litiga-tion activities are especially troubling. The role of the Federal agencies is not to develop or shape the law but, rather, to carry out the law and, when necessary, perhaps provide a thumb on the scales.

Eight years ago, the Americans with Disabilities Act was passed with high expectations—for addressing those areas where Congress had documented real and pervasive disability-based discrimination, and for promoting economic opportunity and full participation. ADA passage also was achieved despite serious concerns about the potential for abuse of such a law. With respect to employment of the severely disabled, the effects of title I are completely disappointing: There have been no real employment gains for the disabled. Those who were concerned about abuses have an abundance of evidence to justify their concerns. The difficulty is that the core ideal of the law is being pushed to extremes that are not defensible to the American public, thus undermining and jeopardizing the acceptance and long term goals of the ADA.

As someone who has had to deal with disability-based discrimination in my own life, I must say that my decision to vote against this report was not an easy one. The staff of the USCCR's Office of Civil Rights Enforcement has worked diligently to produce some very useful research and to elucidate the major issues raised by EEOC and DOJ's enforcement activities. As Commissioners, we have a special responsibility to facilitate, encourage, and contribute to the marketplace of ideas. In that marketplace, reasonable people can disagree. From my own experience, both personally and professionally, this is particularly true when we debate a topic as complex as Federal enforcement of the ADA. We may differ as to the steps we recommend for achieving our goal, but we are united in our commitment to the goal itself: Protecting the rights of the millions of disabled citizens who continue to struggle for equal access, equal opportunity in the workplace, and an equal chance to contribute to America's future.

APPENDIX A
ADA Charges by Bases

Bases*	Number of ADA charges	Percentage of ADA charges
Other disability	41,872	23.05
Back impairment	26,437	14.55
Emotional/psychiatric impairment	20,651	11.37
Neurological impairment	17,723	9.75
Extremities	16,247	8.94
Regarded as disabled	11,162	6.14
Heart/cardiovascular impairment	6,320	3.48
Diabetes	5,372	2.96
Hearing impairment	4,763	2.62
Vision impairment	4,044	2.23
Cancer	3,577	1.97
Alcoholism	3,318	1.83
Record of disability	3,098	1.71
Asthma	2,635	1.45
HIV	2,566	1.41
Drug addiction	1,606	0.88
Gastrointestinal impairment	1,427	0.79
Other blood disorder	1,394	0.77
Respiratory/pulmonary disorder	1,391	0.77
Speech impairment	1,100	0.61
Allergies	1,089	0.60
Relationship/association with an individual with a disability	1,059	0.58
Kidney impairment	978	0.54
Mental retardation	674	0.37
Chemical sensitivities	605	0.33
Disfigurement	506	0.28
Dwarfism	74	0.04
Total‡	181,688	100

Note: Charges include both ADA-only charges and charges identifying ADA and another statute(s).
* Charging parties may identify up to six bases.
‡ Total represents total bases identified (not total charges). Non-disability bases filed jointly with other statues (such as discrimination based on race, religion, sex, etc.) have been excluded from the total.
Source: EEOC, Charge Data System.

APPENDIX B
ADA Charges by Issue

Issue*	Number of ADA charges	Percentage of ADA charges
Discharge	87,507	34.29
Reasonable accommodation	34,528	13.53
Terms and conditions	29,275	11.47
Harassment	17,345	6.80
Hiring	15,054	5.90
Other	8,128	3.19
Discipline	6,546	2.57
Layoff	6,420	2.52
Promotion	5,915	2.32
Wages	5,042	1.98
Demotion	4,924	1.93
Constructive discharge	4,896	1.92
Reinstatement	4,695	1.84
Suspension	3,543	1.39
Benefits	3,168	1.24
Intimidation	2,931	1.15
Sexual harassment	2,595	1.02
Assignment	2,056	0.81
Recall	1,841	0.72
Benefits—insurance	1,310	0.51
Training	1,198	0.47
Union representation	944	0.37
Prohibited medical inquiry/exam	711	0.28
Retirement involuntary	689	0.27
Job classification	585	0.23
References unfavorable	477	0.19
Benefits—retirement/pension	342	0.13
Exclusion	343	0.13
Referral	335	0.13
Maternity	294	0.12
Qualifications	306	0.12
Seniority	312	0.12
Testing	214	0.08
Record keeping violation	172	0.07
Tenure	183	0.07
Severance pay denied	90	0.04
Filing EEO forms	57	0.02
Advertising	31	0.01
Apprenticeship	35	0.01
Waiver of ADEA suit rights	16	0.01
Early retirement incentive	35	0.01
Posting notice	25	0.01
Segregated facilities	29	0.01

Issue*	Number of ADA charges	Percentage of ADA charges
English language only rule	2	0.00
Other language/accent issue	8	0.00
Paternity	12	0.00
Segregated locals	5	0.00
Total‡	255,169	100.00

Note: Charges include both ADA-only charges and charges identifying ADA and another statute(s).
* Charging parties may identify up to eight issues.
‡ Total represents total issues identified (not total charges). Total includes issues identified in ADA-only complaints and complaints filed jointly with other statues.
Source: EEOC, Charge Data System.

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